VOLUME V NUMBER 4

MISSISSIPPI LAW JOURNAL

AUGUST, 1933

Published by
UNIVERSITY OF MISSISSIPPI LAW SCHOOL
and
MISSISSIPPI STATE BAR

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Entered as second class matter at the Post Office at University, Mississippi, with additional entry at the Post Office at Jackson, Tennessee.

$3.00 PER ANNUM . . . . . 75 CENTS PER NUMBER

Editorial and Business Office . . . . UNIVERSITY, MISS.

MISSISSIPPI LAW JOURNAL

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MISSISSIPPI LAW JOURNAL

JOURNAL *of the* MISSISSIPPI STATE BAR

Vol. V AUGUST, 1933 No. 4

THE PRESIDENTIAL CANVASS OF 1860 IN MISSISSIPPI*

By Percy Lee Rainwater**

Presidential campaigns in the United States have not generally been marked by clearness and sharpness of national issues. The campaign of 1860 was an exception. The old issues of the National Bank, the tariff, and internal improvements were, if not settled, swallowed up by the sectional controversy over the extension of slavery. In the campaign of 1860 every intelligent voter knew precisely what the position of Lincoln, of Breckinridge, or of Douglas was on the slavery question, the only important issue of the campaign. They knew that the Lincoln and Breckinridge parties stood at opposite poles of opinion on the subject and that the parties of Douglas and Bell stood for compromise.[1]

In 1860, for the first time in the history of presidential campaigns, a candidate for "the honorable office of President entered the arena and made stump speeches to obtain it." This campaigning in person for the presidency was looked upon in Mississippi as lacking dignity and self-respect. Douglas particularly was ridiculed for "roaming over the country making electioneering speeches and parading his own self-exalted merits." Jefferson Davis said in a speech at Holly Springs that Douglas was an "itinerant advocate of his own claims, and that this of itself disqualified him for the Presidency." He said that he would have been better satisfied if Breckinridge had not listened to the solicitation of his neighbors, and refused to make

*This article is Chapter VII of a dissertation entitled *Mississippi—Storm Center of Secession, 1856-1861,* which has been submitted and accepted as meeting dissertation requirements for the degree of Ph.D. at the University of Chicago.

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1 *Natchez Free Trader,* Sept. 4, 1860. Dodd, Jefferson Davis, p. 189.

speeches. John Bell had, at least, said Davis, "stayed at home and behaved himself like a gentleman."[2]

No presidential campaign, except perhaps that of 1840, had been more exciting in Mississippi than was that of 1860. Mass meetings, barbecues, public speaking, torchlight processions, flag presentations, fireworks, and patriotic slogans were generously employed by the partisans of both Breckinridge and Bell[3] The regular Democratic organization of the State, with the habit of carrying both State and presidential elections by constantly increasing majorities, labored during the canvass to fuse all the partisan groups of the State and unite them, for the protection of the peculiar institutions of the South, in the support of Breckinridge and Lane. To this end, the entire repertoire of Democratic orators was sent forth to regale the people upon the hustings. Active in the canvass were such well known favorites as Reuben Davis, Ethelbert and William Barksdale, D. C. Glenn, John J. McRae, A. G. Brown, Ex-Governor McWillie, L. Q. C. Lamar, Governor John J. Pettus, O. R. Singleton, and Jefferson Davis, who during the last six weeks of the campaign was on the stump in Mississippi "wielding the battle axe of Richard" for Breckinridge and Lane.[4] The object of the Mississippi Democracy was not merely one of carrying the State for Breckinridge and Lane but of obtaining such a degree of political unity under its banner as would make the Opposition or Union party impotent in opposing the secession of the State in the event Lincoln was elected.

The Union party, on the other hand, had no hope of carrying the State for Bell and Everett. "We cannot," wrote W. L. Sharkey and fifteen other prominent Union men in Mississippi to John J. Crittenden, "give to our friends abroad any very confident assurance of absolute success in Mississippi." Sharkey and his co-workers urged Crittenden to come to Mississippi and address in the city of Jackson, a mass meeting of the people of the state to be held there on the fourth and fifth of October for the

2 *Natchez Free Trader,* Sept. 4, 1860. *Natchez Courier,* Oct. 12, 1860 (Quoting the Holly Springs *Constitutional Union).* Jefferson Davis to Franklin Pierce, Sept. 2, 1859, Dunbar Rowland, JEFFERSON DAVIS, Vol. IV, p. 94.

3 Extant Mississippi newspapers for July, August, September, and October 1860 are full of material in proof of this statement. See especially, *Natchez Free Trader,* August 25; *Natchez Courier,* Sept. 11, October 26, November 6, and November 7, 1860; *Vicksburg Whig,* Sept. 26 and July 3, 1860.

When Jefferson Davis spoke at Holly Springs on October 16, 1860, "the streets were illuminated by bonfires composed of burning tar barrels—altogether made a somewhat uproarous scene." MS. B. L. C. Wailes, Diary, entry for October 16, 1860.

4 *Vicksburg Whig,* Sept. 14, 1860; *Natchez Free Trader,* October 5, 1860.

purpose of "strengthening the Union party in one of the strongholds of secession and disunion." The writers addressed no mere "formal invitation" to Crittenden but a "particular and special" plea, a Macedonian call, so to speak, because

> to avail ourselves of the advantage as far as possible, so as if not absolutely to overthrow the secession party, yet to make it a drawn battle or yield to our foes a meager and profitless victory, in this State, seems to us to be of the **very greatest** importance to the friends of the Union throughout the South. Nothing would so certainly paralyze the arm of disunion which is now ready to be lifted to strike a fatal blow to our institutions. We do not deceive ourselves: the party to which we are opposed is bent on mischief in the event of the election of the Black Republican candidate for the presidency; they are well organized and fully determined on their course and nothing will give them pause but the poll of a very large if not triumphant vote of the Union party in this State, which would speak to them in tones of warning they would not dare to disregard, and would inspire the Union party throughout the Southern States with renewed hope and confidence.[5]

The Union party, then, represented conservative opinion in the South in contradistinction to the Breckinridge or Southern party, the great majority of whose partisans were for immediate secession in the event of Lincoln's election. On the whole, it may be safely affirmed that in Mississippi the first choice of the Southern party was for Breckinridge and that its second choice was the election of Lincoln. The election of either Bell or Douglas would mean, so it was affirmed, the spread of Freesoilism to the South. The *Woodville Republican* expressed this view when it declared: "The election of Breckinridge will save the South and the Union; the election of Lincoln may save the South; but the election of Bell or Douglas will surrender the South to the fanaticism of the North."[6] In other words, the Southern

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5 Ms. W. L. Sharkey et al. to John J. Crittenden, Jackson, Mississippi, Sept. 14, 1860, Crittenden Papers, Vol. 23, pp. 4714-4715. This letter is signed by the following in the order named: F. Anderson, R. L. Buck, W. L. Sharkey, W. P. Anderson, George L. Potter, F. S. Hunt, Wm. Yerger, M. S. Craft, John Sheldon, Patrick Henry, A. Burwell, James B. Ross, D. Sheldon, C. S. Buck, T. P. Ware, H. H. Miller.

The *Vicksburg Sun*, October 15, 1860, says: "The great Union mass meeting that came off in Jackson last week, was a most lame and impotent conclusion. Many distinguished speakers from abroad were anxiously anticipated but lo! none came. Sparrows chirped in the places where the notes of eagles were expected to startle and command the ears of the multitude. Crittenden's appointment was filled by C. F. Hamer of Yazoo City. . . . ."

6 *Natchez Courier*, November 2, 1860 (Quoting *Woodville Republican*). See also, *Natchez Courier*, Sept. 25, 1860; *Vicksburg Sun*, November 5, 1860; *Natchez Free Trader*, August 21, 1860.

party in Mississippi was willing that the Union should survive if Breckinridge were elected to the presidency. If Breckinridge could not be elected, then Lincoln was preferable to either Bell or Douglas because Lincoln's election would furnish a justifiable reason, it was argued, for the South to exercise the right of secession which most Breckinridge supporters believed was a peaceable remedy for the ills of the South. Inasmuch as the Union party drew to its banner the great body of conservative opinion in Mississippi, while the Southern or Breckinridge party, with the control of the Democratic party machinery in its hands and the prestige of past success to aid it, held firmly the overwhelming majority of those who for traditional reasons voted with the Southern wing of the Democracy; the Douglas party, a hopeless minority in Mississippi, was caught between two stools, neither of which, in the view of Mississippi National Democrats, furnished a very satisfactory resting place. As a result of this condition, Douglas did not poll his real strength in Mississippi. A few of his supporters, who were most ardently attached to the Union, voted for Bell in the hope that a formidable vote for the Union candidate would check the secession movement in the State. Many others, having a traditional prejudice against the groups supporting Bell, swung to the support of Breckinridge without any intention of aiding the progress of secession in the State in order to prevent, as they thought, the State from being carried by the Union candidate.[7]

The appearance of Henry S. Foote on the stump in Mississippi during the month of October fell "like a bomb shell in the midst of the Breckinridge-Yancey Democracy."

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7 Daniel B. Wright of Tippah, ex-Congressman from the first district, was at the beginning of the canvass an ardent supporter of Douglas. When, therefore, the Douglas State Convention met at Holly Springs on July 30, 1860, Wright, still believing in the principles for which Douglas stood, was campaigning for Breckinridge in order "to keep Mississippi from going for Bell." See *Vicksburg Whig,* August 4, and October 26, 1860; *Natchez Courier,* Sept. 25, 1860; *Vicksburg Sun,* November 5, 1860; *Natchez Free Trader,* August 21, 1860; *Natchez Courier,* October 18, 1860.

Ms. H. S. Fulkerson—*A Civilian's Recollection of the War Between the States,* Chapter 1.

So strong a Union County as Tishomingo where the strength of Douglas centered in Corinth about the Leadership of B. N. Kinyon, editor of the *Corinth True Democrat,* deserted Douglas to carry the county for Breckinridge by a vote of 1748 to 1412 for Bell. Yet, the county, by a vote of nearly three to one, sent Union delegates to the convention of 1861. In other words the Douglas Democrats of Tishomingo were willing to vote for Breckinridge in order to defeat Bell but utterly unwilling, like East Tennessee, from which most of them came, to secede from the Union. Similar results were shown in Pontotoc and other Northern counties. See below Chapter IX.

Challenging all comers, and especially Jefferson Davis, to joint debate, Foote, with all the fire which he exhibited in the "gallant fight for the Union" in 1851, extolled the virtues of Douglas and "poured out the vials of his patriotic wrath" on Yancey and company, and particularly upon Jefferson Davis. Foote asserted that Davis was in 1851 the "head and front of the whole disunion party" in the South; and that later Davis became a "submissionist" in order to get place and power; and that now, no longer a leader in secession, he was an "inglorious subordinate to the black hearted traitor, William L. Yancey." Rallying the Union men about him, Foote, true to his nickname, "Hangman Foote"—given him after his threat to assist in the hanging of Hale of New Hampshire[8]—asserted that "we will hang every man who dares to dishonor himself by an effort to break up this glorious heritage of ours." Foote spoke at Holly Springs on October the fourth and at Corinth on October eighteenth. "It is impossible," said a reporter for the *Natchez Courier*, "to describe his speech. While it was in language courteous, high toned, and dignified, there never was in any effort I have yet listened to, one tithe of the concentrated essence of the bitterness, rebuke, and denunciation there was in his .... He vindicated Judge Douglas fully as a friend of the South. .... He denounced the whole set of Sectional and Seceding Breckinridge leaders as conspirators against the Union, and traitors to the sacred cause of Constitutional liberty. I can give you no idea of the bitterness and force of Gov. Foote's invective. Its crushing effect almost inspired a feeling of pity and sympathy for those who were so righteously, but so mercilessly castigated." The Breckinridge orators gave Foote "a wide berth" and merely "followed up at a respectful distance" in order "to rub out his marks."[9] However, it was now Foote, and not Davis, who was bearing "the forlorn hope" and thus in November Douglas received only 3,283 of the 69,020 votes cast in Mississippi.[10]

So far as Mississippi was concerned, Douglas was, then from the beginning of the canvass, a "dead cock in the pit."[11] In Mississippi the contest was obviously between

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8 *Proceedings and Debates of the United States Senate*, 1st Session, 30th Congress, p. 516.

9 *Natchez Courier*, October 16 and 23, 1860; *Memphis Appeal*, October 25, 1860.

10 Ms. Returns of Presidential election in November, 1860, by counties, *Records of the Secretary of State*, Series E, Vol. 85. See also, Greeley, AMERICAN CONFLICT, Vol. I, p. 368.

11 *Vicksburg Sun*, November 5, 1860.

Bell and Breckinridge, each of whom was declared by his partisans to be a better Union man than the other.[12] The Breckinridge party in Mississippi conducted the campaign, through the press and on the stump, upon the theory that unless its candidate could be elected, Lincoln would be; and that in the latter contingency the State should secede from the Union. Plans, whether by separate State action or by concert with at least the Gulf States, for bringing about the secession were not discussed during the heat of the canvass. From the beginning of the canvass, the Constitutional Union party in Mississippi maintained that a vote for Breckinridge and Lane was indirectly a vote for Lincoln.[13] The partisans of Bell and Everett stoutly affirmed that neither of the Democratic nominees could be elected; and that, therefore, the only way to prevent the election of Lincoln was for both Breckinridge and Douglas to withdraw from the contest and the people unite on Bell and Everett as Union men. Dr. Stephen Duncan of Natchez, "a 4000 bale planter and the owner of 500 negroes," and for many years a prominent figure in Mississippi, advised that

> Nothing can prevent the election of Lincoln but the withdrawal of both Breckinridge and Douglas, or an uprising of the people such as there was in 1840, in a determination to put down parties. . . . . It is conceded by all that neither Breckinridge nor Douglas can be elected, and that neither of them can obtain a majority in all of the Southern States. In my opinion there is but one safe course, and that is, to abolish all party names and party distinctions, and the people unite on Bell and Everett as Union men. If they can be elected, we might feel at peace, quiet, and harmony, with a total cessation of all sectional feeling and strife for the next twenty years to come. And with such an assurance Southern property would immediately rise in value. If there is no such assurance—if there be a prospect of continued sectional strife—property must depreciate: many men will be deterred from purchasing or investing in Southern securities by the apprehension of this continued sectional strife, and this continued threat of disunion.[14]

Although the Breckinridge Democrats in Mississippi had no hope of electing their candidate, particularly when in October the State elections in Pennsylvania, Indiana,

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12 Ms. Peter B. Starke to Governor John J. Pettus, July 1860, Series E, Governor's Records, Vol. 49.

13 *Vicksburg Whig*, July 4 and 17, August 7, and October 12 and 20, 1860.

14 Dr. Stephen Duncan to a friend in Louisiana, Saratoga Springs, New York, August 15, 1860, in the *Natchez Courier*, September 19, 1860.

and Ohio went against the Democrats;[15] they not only refused to unite on Bell and Everett but, on the other hand, warmly denounced them as unsound on the slavery question and untrue to the South. While many of the ultra Democrats were predicting the election of Lincoln, the canvass in the interest of Breckinridge and Lane was pushed with the utmost zeal, and Ethelbert Barksdale, the editor of the *Mississippian,* declared that "99 out of every 100 men who are supporting Breckinridge and Lane" would be for secession in the event of Lincoln's election.[16] On the other hand, I. M. Patridge, editor of the *Vicksburg Whig,* who was one of the most active stump speakers for Bell and Everett, declared that,

> It is a singular fact that nine-tenths of those actually and directly interested in the institution of slavery, and who possess in addition as much intelligence and patriotism as any other class, are conservative in their views and feelings and look upon the destruction of the Union as the greatest of calamities. The enemies of the Union are mostly a class who have not the capacity to appreciate the government under which they live.[17]

The Constitutional Union party, therefore, throughout the campaign, regarded the Breckinridge party as a se-

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15 The editor of *The American Citizen* (Canton) says that at a "grand Breckinridge mass meeting and barbecue" at Canton on the 13th of September, the speeches of D. C. Glenn, A. G. Brown, and Gov. Pettus were "DISUNIONISM, sublimated and boiled down, and these sentiments were greeted with shouts that made the welkin ring, and beating of bludgeons that made the court house shake to its foundations. All the speakers declared the election of Lincoln to be probable, and all of them said that if he were elected they were for immediate DISUNION." See the *New Orleans Bee,* September 22, 1860. Also, Speech of A. G. Brown at Vicksburg on 18th of October, in *Vicksburg Whig,* October 23, 1860.

Many of the leaders among the Breckinridge supports were so sure, after the elections in Ohio, Indiana, and Pennsylvania, of Lincoln's final triumph at the polls that they began to promote "harmony meetings" in the several counties with the view of uniting all groups for secession. One such meeting in Carroll county was addressed by James Z. George and another in Harrison county by D. C. Glenn. See the *Mississippian,* October 31, 1860.

The *Memphis Argus* of October 13, 1860 says that as a result of the recent election in several of the free states, "Hemp, swords, and bayonets are talked of as glibly as if they were harmless intruments of political discipline, and rebellion and treason are viewed as no longer far distant evils."

". . . . . I feel and believe it to be the duty and only safety of the South, to cast an undivided vote for the candidates of the Southern Democracy. I believe, however, that the Republicans will elect a President. What then? . . . . Rather than submit to a disgrace so black and damning [the inauguration of a Black Republican President] we should grapple the pillars that support this tottering fabric called the Union, and drag it down upon their heads, burying the old Hell-imps beneath its ruin." B. R. Holmes of Benton, Mississippi to W. S. Epperson, S. M. Phillips, S. M. Armistead of Yazoo City, in the *Mississippian,* September 19, 1860.

16 The *Mississippian,* October 31, 1860.

17 *Vicksburg Whig,* October 24, 1860.

cession party deliberately at work to "precipitate the South into a revolution."[18] In other words, the old issue of Union or disunion was again before the people as it had been in 1851. The issue was not as direct and as clear cut as in the following December when delegates were chosen to the Convention of 1861, but the same social and economic groups were, in both cases, arrayed against each other. Both of these groups desired to perpetuate the institution of slavery but they differed sharply as to the value of the Union as a means to that end. It was this sharp difference of opinion between two social and economic groups as to the value of the Constitution and the Union as a shield and as a protection to the institution of slavery that gave point to the controversy over secession in Mississippi. During the canvass, the Union press and Union orators repeatedly affirmed that "the only hope of slavery is in the Union."[19] Dr. Stephen Duncan, one of the wealthiest men in the South [in the letter quoted above in part] regarded secession as a "monstrous" idea. "It is most strange to me," said Dr. Duncan, "that any cotton or sugar planter should, for one moment, allow the thought of disunion to enter his mind. . . . . Any man of sense and reflection cannot fail to see that, after disunion, we should, be in no better condition in one respect, and in almost all respects infinitely worse. Our taxes alone would consume more than one-quarter of our products; for, under a Southern Republic, there would be no premium collected for imports, but all derived from direct taxation and to an enormous extent. . . . If the Union is to be dissolved, I, for one, would be for selling out my possessions immediately."

For thus expressing an attitude towards disunion which was undoubtedly typical of the larger slave owners, Dr. Duncan was soundly abused by the secession press. The *Vicksburg Sun* declared that "such a man is an actual dead weight upon the cause of Southern rights." The editor had no respect for a man who having made all his money in the South, would abandon the people who nurtured him and seek a secure retreat "among our Northern enemies. Such pusillanimity deserves the execration of every true friend of the South. So the doctor need not suppose that his Higira from the South would be regarded as a public calamity."[20] A thoughtful writer, himself a small slaveholder, criticized the position of Dr. Duncan

18 Material too voluminous to cite. See especially: *Natchez Courier*, August 17, September 28, and October 16, and November 2, 1860; *Vicksburg Whig*, October 20, 1860.

19 *Vicksburg Whig*, October 20, 1860.

20 *Vicksburg Whig*, October 22, 1860.

and the larger planters generally for their attitude towards disunion. The writer maintained that the largest slave owners would be vastly less affected by the total destruction of the value of slave property than would the small slave owner. Many of the largest slave owners, Dr. Duncan among the rest, it was asserted, had invested great amounts of their surplus in stocks and real estate in the North, or elsewhere out of the South, and that should slave property become valueless they would still have wealth to fall back upon; "while the vast majority of slave owners, not being able or inclined to so invest, will, in such an event be left worse than destitute." The writer was not in favor of abandoning his rights and "cringing before a factious majority" and he wished to assure the "Doctor and others like him" that if they would "sell out cheap, on easy terms, and in lots to suit purchasers, the present number of slave owners and *defenders* of that acquired and rightful property will be greatly increased."[21] The editor of the *Free Trader,* taking his fellow townsman severely to task, declared that Dr. Duncan, a type of the "rich Southern planter," working quietly through his "pliant agents and 4000 bales of cotton and 500 negroes" had always been opposed to the best "democratic measures." The editor felt that the "lamentations of a 4000 bale planter and owner of 500 negroes" would have no influence on the mass of voters in the State for

> brains, not money; principles, not accidental position, rules the people of the South. England is the appropriate place for nabobs, where men bow humbly before the Gessler cap of money, and where lords are invested with every 'virtue under heaven.' But in the Southern States, 'men who make 4000 bales of cotton and own 500 negroes' have not as much influence on that account as the humblest mechanic who advocates correct principles.[22]

21 *Natchez Free Trader*, September 25, 1860.

22 *Ibid.*, September 19, 1860.

Ms. Wiley P. Harris in his Autobiography says characterizing the "River Planters": "As a matter of fact, the men who were the most active in the political movement which led to secession, were not slave owners. Few of them held slaves at all. The great slave owners always selected as the types, 'The River Planters', were without influence. They were unpopular as a class. I make some exceptions of course, but as a class they deserved to be unpopular. The insufferable arrogance and ostentation at home and abroad drew upon them actual antipathy everywhere. . . . . The steamboats on the Mississippi from Memphis to New Orleans were always crowded and monopolized by them. They talked about 'boll-worm' and 'cotton worm', 'my commission merchant', 'my overseer' and the manner of treating the runaways, etc., etc., in a loud tone at meals and everywhere ignoring everybody save the 'commission merchant' to whom the planter was generally in debt. They carried this to the watering places and to the summer resorts and became a thorough and a recognized nuisance. They were generally ignorant, begotted and intolerant of

Inasmuch as the issues of the canvass involved, fundamentally, the perpetuity of the institution of slavery, even to the point of secession and possible war in an effort to keep intact the South's social and economic institutions, the question of what claim those institutions had upon the loyalties of the mass of people who were not slaveholders had to be faced. Early in the canvass, Pierre Soule, perhaps the most prominent Douglas orator in the South, made some speeches in Mississippi in which he argued that the non-slaveholders had no interest in the preservation of the institution of slavery and that, therefore, they should not vote for Breckinridge and Lane, the secessionist candidates. He argued that Douglas was interested in the people of the whole nation and not merely in those of a particular section.[23] In order to meet the challenge which called upon the mass of voters to turn against an institution in which it was alleged that they had no interest, the Breckinridge press and orators proclaimed the doctrine that the non-slaveholder was more interested in the institution of slavery than the master who counted his slaves by the hundred. This doctrine, said the *Vicksburg Whig,* was

> maintained by these men, most of whom do not own the toe-nail of a negro, and who would not know what to do with one, except to sell him, if they had one, for the purpose of justifying their impertinent intermeddling in the affairs of slave owners. If Mr. A owns two or three hundred negroes, and don't see the peculiar plan of salvation in the Democratic party, and don't recognize the Messiah in the Democratic candidate, Mr. B, who don't own a negro, feels perfectly justified in denouncing him as unsound, and men, who under ordinary circumstances would not consider Mr. B's opinion of any worth, receive his **ipse dixit** with approval and profess to look upon him [Mr. A] with suspicion. If Mr. A does not think the Union ought to be dissolved, or should happen to suggest that he regarded his property as safe in the Union as it would be out of it, Mr. B forthwith denounces Mr. A as an abolitionist.[24]

In so far, therefore, as the issue of rich and poor was involved in the canvass, the agencies promoting the candidacy of Breckinridge and Lane proceeded upon the principle that the poor man's social and moneyed interest would be benefited by the election of Breckinridge because with

contradiction. The people generally were disposed to maintain the rights of the South to her influence in the common Government, and to a fair share of the Territory acquired. The slaveholders as a class were averse to this movement. They were just where they desired to remain.''

23 *American Citizen* (Canton), Sept. 1, 1860; *Natchez Free Trader,* October 18, 1860.

24 *Natchez Free Trader,* October 24, 1860.

Breckinridge alone, of all the presidential aspirants, would the institutions of the South be safe.[25] Very shortly after Soule's speaking tour in Mississippi, a committee of citizens of Carroll county called upon Senator A. G. Brown, popularly known in his State as the "poor man's friend," to reply in writing to the question: "What interest have non-slaveholders in the South in the question of slavery?" The Senator replied to the inquiry which the *Mississippian* said was of "growing importance and very pertinent to the present canvass," in a letter of some 6000 words, which the *Mississippian* published in pamphlet form for general circulation.[26] Since Brown's letter presents, undoubtedly, in clear and bold relief, the inarticulate views of the "poor whites" of the State with reference to slavery and reveals attitudes and motives for action among the non-slaveholding groups generally, sufficient quotation will be made to show the main lines of thought. In the first place, Senator Brown informed his correspondents that he was of the opinion that the great mass of non-slaveholders in his State were quite well informed of their interest, moneyed and social, in the institution of slavery and that he was addressing his remarks to the "few" who did not understand the diversified interests of the community in which they lived. "It is a great mistake," said the Senator, "if the non-slaveholder supposes that because he owns no slaves, he therefore has no PECUNIARY interest in slavery."

Does the non-slaveholder own land? What will his land be worth when slavery is abolished? Is he the owner of cattle, horses, and other property? What will all these be worth in a free negro community? Does he live by cultivating the soil? Who creates markets and builds railroads, and provides otherwise, by his money and his brains, for the most profitable means for selling the products of the soil? The slaveholder. Who gets the benefits of these markets, railroads, and other profitable

25 The *Vicksburg Whig*, Sept. 15, 1860, said: "The secession press are discussing the issues of the present canvass, on the issue of rich and poor. . . . . The secession editors attempt to convince the poor man that he is to be wonderfully benefited by the election of a secessionist to the Presidency. Well, yes—he will be made a soldier of, taken away from his family, paid about fifty cents a day, and marched off to the borders of the free States, to enable a valiant secession leader to show how willing he is for the South to fight, provided he is an officer out of danger, and the poor men of the South are put in the front ranks to be shot down to his glory. This is Breckinridge Secessionism to the poor man."

26 *Mississippian*, October 10, 1860. This issue of the *Mississippian* contains Brown's letter written from Terry, Hinds county, Sept. 27, 1860. The letter is addressed to Messrs. J. Z. George, G. F. Neill, J. P. Scales, Dr. W. W. Liddell, W. Ray, and W. B. Helm, all of Carrollton, Miss.

means, and with comparatively little cost? The non-slaveholding farmer. Then, let him not say, 'I own no slaves, and therefore have no interest in the question.'

Is he a mechanic? Who is his best and most profitable employer? The slaveholder. Is he a merchant? Who buys most of his goods? The slaveholder. Is he a lawyer or doctor? Who pays him the most fees? The slaveholder. Does he, in short, rely on his muscle or his brain for bread? Who is his best customer? The slaveholder. Then let no man of any occupation, trade or profession, say, 'I own no slaves, and therefore I have no interest in the question.'

All are interested; all have an immediate, positive and PECUNIARY interest in the question, and all ought, as I have no doubt all will, stand up manfully in its support.

Non-slaveholders have been told, and no doubt will be told again, that slavery antagonizes with free labor. In plain English, that if there were no slaves, they would get better wages for their labor. On the contrary, I assert that slavery in the slave States is the assisting handmaid of free labor. In all non-slaveholding communities, capital antagonizes directly with free labor; and why? Because in such communities capital hires its labor, and is, therefore, interested in getting it at the lowest possible price. In slaveholding communities, on the other hand, capital, as a general rule, owns its labor, and is therefore interested in putting up the price of labor to the highest possible point. The man who either hires or buys labor is, first interested in getting it at the lowest price, and next, in selling the products of labor at the highest price. On these two points he rests all his prospects of gain. Now let us see how the two systems work in practice.

A owns a hundred thousand dollars in Massachusetts, and chooses to employ it in manufacturing. He hires his labor, for the simple reason that the laws of his State do not allow him to buy and hold slaves. Now what is the first great motive of A? Manifestly, to hire his labor at the very lowest possible price. B on the other hand, a Mississippian, owns a hundred thousand dollars, and he employs it in raising cotton. Instead of hiring, he BUYS his labor (slaves). Of course, his first great object is to buy at the lowest price; but this being done, his next and greatest object is to sell at the highest price. To this end, he directs all his talents, skill and capital. He creates and keeps up markets for the sale of his products or the production of his slave labor and into these markets the non-slaveholder enters and sells on equal and often on better terms.

The same is true of mechanics. . . . . If A hired his slaves instead of owning them, he would of course hire at the lowest price, and then his case would be just like B's. But, as he owns his slaves, his capital, instead of being employed to oppress and grind down the wages of labor, is engaged in sustaining and

bearing up these wages. If A sells the products of his slave labor at high prices, the free white laborer sells his at the same price. . . . .

But the non-slaveholder's pecuniary interest in slavery was, according to Senator Brown, "as dross, when compared to that other higher, loftier, and holier interest, namely: THE SOCIAL INTEREST." The Senator drew a very dismal and alarming picture of Southern society if the abolitionists of the North were permitted to carry out their design of destroying slavery in the States:

It is easy to see the course things will take after we have passed the point of emancipation. The large slaveholders, and thousands of the smaller ones, will abandon the country. The large slaveholders are now timid and shrink from the consequences of meeting this question. Rich men shrink instinctively from danger. Rich men are afraid of anything that unsettles titles. They had always rather 'bear the ills they have, than fly to those they know not of.' I do not mean to say that rich men are not patriots; far from it. But I do mean to say that in all cases where violent shocks and political revolutions are likely to occur, they are not so much to be relied on as poor men. Allow that both the rich and the poor are equally patriotic, and equally alive to any danger that threatens the domestic household. The rich man still has his titles to look after; and then he feels that if the worst comes to the worst, he can take himself and his family to some place of security. This is what makes him less reliable. The poor man's judgment is not warped in looking after titles, and he sees just as clearly that he cannot take his family to a place of security as the rich man sees he can.

I have said that the rich will flee the country and so they will. They will see the danger afar off and will prepare to meet it. With heads erect, they will have nothing else to do but to watch the gathering storm and prepare to meet its coming. But the poor who are doomed to toil—whose honest faces are bent to earth in pursuit of bread—they have no time to watch the storm or to mark its coming. When it bursts upon us all, the rich will have put their houses in order. The poor will have to bear its fury. When its first shock is over, it will be found that the rich have fled, and the poor alone will be left to await whatever fate betides them. What will that fate be? It will be found that millions of negroes, now held in subjection by masters, who restrain their licentiousness, have been set at liberty to maraud, and plunder and steal. That their former masters have gone, and the poor non-slaveholder alone is left to bear their insolence and to submit to their exactions, or else to take up arms in the unequal contest which they and their Northern friends will wage. Then the non-slaveholder will begin to see what his real fate is. The negro will intrude into his presence—insist on being treated

as an equal—that he shall go to the white man's bed, and white man his—that his son shall marry the white man's daughter, and the white man's daughter his son. In short that they shall live on terms of perfect social equality. The non-slaveholder will, of course, reject the terms. Then will commence a war of races such as has marked the history of San Domingo. An unequal war, because it will be a war in which the negro and his Northern friends will stand on one side, and the non-slaveholder, deserted by the slaveholder, will stand on the other. . . . .

The Senator further pointed out that in every society there must be some one to perform the menial tasks of life; and that when, and if, slavery were abolished, this kind of work would be performed by white menials. He drew a vivid picture of how the poor Southern white man's blood would boil like "a seething cauldron" when as would be the case under a free negro society, his son and his daughter respectively were asked to become a "carriage driver" or "a chambermaid in a public hotel." "Slavery equalizes white people," argued Brown.

In slaveholding communities, there are two classes of society. One is white and other is black. Color draws the line. In all communities where slavery does not exist, there are various classes. Wealth, occupation, birth, family, and other accidents of good or ill fortune draw the line. . . . .

In conclusion, Brown appealed to the non-slaveholders to defend the institution of slavery because of their own social and pecuniary interests. He declared that

If the slaveholders through their timidity, will not defend their property that is surely no reason why the non-slaveholder should fold his arms and see his wife and daughters and sons reduced to a condition of social equality with free negroes. It is his duty to move, move vigorously, actively, and energetically. One active blow now is worth more than a life of active service will be when the day is lost.

Brown's appeal, which was largely to the instinct of fear, was used rather generally by Breckinridge stump speakers during the course of the canvass.[27] To the supporters of Bell and Everett, which included most of those in Mississippi who had a large vested interest in society, the whole purport of the appeals, speeches, letters, and pamphlets made use of by those who directed the canvass for Breckinridge, had a common aim and object; namely, "arousing passion and prejudice, and undermining the loyalty of the Southern people to the Union and the Con-

27 *The Mississippian*, October 24, 1860.

stitution."[28] The leaders of the Union Party in the State repeatedly declared during the canvass that the Southern party was a secession party and that its leaders were deliberately attempting to create chaos in order to fish in troubled waters. "The disunionist," said the *Vicksburg Whig,* "wants turmoil. He desires agitation; anything to stir up strife. He is the petrel of the political waters, and delights in, and screams over, the tempest-tossed waves. Hence he is for Breckinridge; or if he cannot get him, he is for Lincoln. If the South wind will not blow up waves enough, he whistles for the North wind. The gentle life-bringing zephyr which blows calmly over the waters, and gives promise of a quiet morrow, he spurns. This latter is not the wind that the wrecker prays for; there is nothing to be made from it."[29] This point of view with reference to the Breckinridge-secession group was emphasized by all those who stumped the State for Bell and Everett. I. M. Patridge of the *Vicksburg Whig,* Giles M. Hillyer of the *Natchez Courier,* Amos R. Johnson of Raymond, Walker Brooke and W. C. Smedes of Vicksburg, H. W. Walter, Sam Benton and J. W. C. Watson of Holly Springs, and, above all, Judge William L. Sharkey spoke daily to large crowds and in tones of warning against the people's following the Breckinridge party leaders in their effort to "precipitate the South into revolution."[30] Judge Sharkey, a very able jurist and long an important political factor in the State, was quite unreserved in his denunciation of the secession leaders as being "unscrupulous, dishonest, and unprincipled demagogues" who were leading the honest but simple masses of the people around "by the nose."[31] He consistently attacked the Supreme Court of the United States for "traveling out of the record in the Dred Scott case" and for "assuming most arbitrary power."[32] The *Mississippian* was shocked that "Northern fanaticism had invaded the sanctuary of justice where that great and good man [Judge Sharkey] sits to spit its venom upon him." The "mild mannered man and a judge of more than ordinary distinction" became, said the editor, "as mad as a March

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28 *Vicksburg Whig,* October 23, 1860.

29 *Natchez Courier,* November 2, 1860.

30 *Vicksburg Whig,* July 17, August 11, October 30, and November 1, 1860; *Vicksburg Herald,* August 15, 1860; *Hinds County Gazette,* Sept. 5, 1860; *Natchez Courier,* Sept. 18, October 10, 25, November 2, 1860.

31 *Mississippian,* Sept. 19, 1860; *Natchez Courier,* October 25, 1860.

32 *Mississippian,* August 8, Sept. 19, 1860; *Natchez Free Trader,* Sept. 20, 1860.

hare'' when he ''dabbles in politics'' and he ''cuts such capers as make men and angels weep for his follies.''[33]

When Judge Sharkey, in the course of his speeches, discussed the threatened secession in the event of Lincoln's election, his eloquence was said to have become powerful and his logic most convincing. If he were not serving in the campaign as a ''cool poultice upon hot Mississippi ultraism,''[34] the Judge was at least getting in some heavy blows designed to cool the ardor of those who considered secession a peaceable and legal remedy, when he declared, as reported in a speech at Liberty in Amite county:

> I charge that the whole course of the Breckinridge party shows that a large majority of that party are in favor of secession in case Lincoln is elected President. Secession is no remedy; it is an impracticable idea. If they wish to do anything they must revolutionize. Revolution is the word and not secession. If we are suffering from evils and those evils are intolerable, we must prepare to beat our plows into swords and plunge them deep into the breasts of our fellow-citizens. That is the only way of getting out of the Union. If a State goes out of the Union she must prepare to wade through blood. Are we prepared to give up all our comforts, all our prosperity, everything and plunge into fierce and unrelenting civil war, simply because a man is elected President under the forms of the Constitution? No man has ever yet been injured by any act of the government, and is it wise to break it up until some act of oppression has fallen upon some citizen? I do not intend to follow Democrats out of the Union just because the reins of government are taken out of their hands. I do not intend to become a traitor to the best government under the sun, because a few disaffected politicians are determined to become so. The disunion clique of Mississippi need not look to the North for the power which will execute upon them the penalties of treason, but tens of thousands of citizens in our own State will rise up to execute them, and if need be, at the point of the bayonet.[35]

Most of those who stumped the State for Breckinridge, represented the very antithesis of the conservative and Union views of Sharkey and other Bell and Everett supporters. A. G. Brown wanted to ''get out of this concern''

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33 Sept. 19, 1860.

34 *Vicksburg Whig*, June 5, 1860.

35 *Natchez Courier*, October 25, 1860: The *Mississippian*, Sept. 26, 1860, quotes ''Mr. Harrell of Hernando, a Douglasite'' as saying ''he would not be surprised if the Union men in Mississippi could whip those called secessionists right here at home. . . . . He said that if Lincoln were elected and a party at the South should rebel against it, it would be the duty of the Union men to wage war against them and whip them into acquiescence until Lincoln committed some overt act.''

and he had neither "the time nor the inclination to discuss the right of secession." If Lincoln were elected, as Brown predicted, then "as soon as the telegraph announces the result, we will," said Brown, "throw out the Southern banner with resistance inscribed upon it, and commit ourselves to the destiny that awaits us, and march to victory or death."[36] To this "noble sentiment" the *Vicksburg Sun* declared that "we have never seen the man who could swallow too big a coal of fire for us—the bigger the better. .... Southern men, gird on your armor and prove the title to your property by your trusty swords."[37] Governor Pettus was quite willing to give up his "interest in the Bunker Hill Monument" and as for the "South's interest in the fourth of July, we will," said Pettus, "make a new one."[38] In a speech at Macon, Governor Pettus declared that the same wire which conveyed the electric flash bringing the intelligence of Lincoln's election, should the next instant carry back his proclamation convening the legislature of Mississippi. He warned that if there were members of the Legislature present, they should, in the event of Lincoln's election, prepare to "set out for the Capitol of the State the next minute."[39] Reuben Davis, in a speech at Houston, declared that he was in favor of resisting the inauguration of Lincoln and that "if the people of Mississippi submitted to Lincoln, he would leave Washington five days before the inauguration, that his eyes might never behold the degradation of the South." Picturing the infamy of submission to a party that would "treat us as bondsmen and slaves," he proclaimed "resistance even to bloodshed, and the people hailed it with fierce delight—such as the war horse feels when he sniffs the scent of battle afar off."[40]

The role played by Jefferson Davis in the presidential canvass of 1860 is a subject of special and particular interest. When a decade earlier, the issue of Union or disunion was before the people of Mississippi, Davis was one of the most ardent "advocates of the *right* of secession" but he was "opposed to its exercise for the provocation then ex-

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36 Speech of A. G. Brown at Vicksburg October 18, 1860, in *Vicksburg Whig,* October 19, 1860.

37 *Natchez Free Trader,* November 13, 1860 (Quoting *Vicksburg Sun).*

38 Speech of Governor Pettus at Columbus, *Vicksburg Whig,* November 1, 1860.

39 *Vicksburg Whig,* November 1, 1860; *Natchez Free Trader,* November 3, 1860.

40 *Mississippian,* October 10, 1860 (Quoting the *Houston Petrel).*

isting."[41] What was the position of Davis with reference to secession in 1860? What words of counsel did he have for his fellow citizens who were "looking anxious around in this the darkest hour of our history," when in September, 1860, "with visor up and lance couched," he entered the list in Mississippi campaigning for Breckinridge and Lane?[42] Unfortunately no full and adequate speech made by Davis during his speaking tour, which covered Mississippi from Corinth and Holly Springs in the North to Enterprise and Woodville in the South, has been found.[43] In view of the fact that the Democratic press published very lengthy reports of speeches made during the campaign by such avowed secessionists as A. G. Brown, Governor John J. Pettus, J. J. McRae, and many others of little or no political importance, it is extraordinary, to say the least, that the press published exceedingly little from the speeches of Jefferson Davis.[44] The student can but wonder why! The answer seems to be that Davis alone, of all those stumping the State for Breckinridge and Lane, was deliberate and guarded in his utterances on the question of

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41 Ms. Autobiography of B. G. Humphreys.

42 *Natchez Free Trader,* October 3, 1860; *Mississippian,* November 14, 1860.

43 Davis' itinerary in Mississippi was, in part, as follows: Memphis, Sept. 18, (approximate date). See *Vicksburg Whig,* Sept. 25, 1860. Corinth, Sept. 21, *Mississippian,* October 10, 1860; *Vicksburg Whig,* October 10, 1860. Holly Springs, Sept. 24, *Natchez Courier,* October 10, 1860. Oxford, Sept. 29, (approximate date), *Natchez Free Trader,* Oct. 3, 1860. Woodville, October 11, *Natchez Free Trader,* October 16, 1860. Holly Springs, October 16, B. L. C. Wailes' Diary, entry for October 16, 1860. The *Mississippian* of October 17, 1860, announces the following appointments of Davis "in lieu of others heretofore announced by handbills": Ripley, October 19; Columbus, October 23; Macon, October 25; Scooba, October 26; Marion Station, Lauderdale county, October 27 (changed to Enterprise, see *Eastern Clarion,* October 24 and 31, 1860); Benton, Yazoo county, October 31; Hazelhurst, November 1; and Vicksburg, November 3.

44 The *Eastern Clarion* of October 31, 1860, the leading newspaper in East Mississippi, published at Paulding, within 25 miles of Enterprise where Davis spoke on October 27, devotes about a dozen lines to Davis' speech, saying that there was "a large crowd in attendance who were aroused to unbounded enthusiasm by the reason and eloquence" of the speaker. The same issue of the *Clarion* devotes six columns to a report of a speech of James Phelam delivered before the Breckinridge Club at Aberdeen; and five columns to a report of the speech of A. G. Brown delivered at Crystal Springs, Sept. 6, 1860. The *Clarion* of October 24, 1860, devotes nine columns to the speech of John J. McRae, delivered before the Breckinridge and Lane Club of Mobile. The *Vicksburg Sun* of November 12, 1860, compliments Davis' speech delivered at the Court House at Vicksburg on the 3rd and says: "We wish that our space would allow us to give an extended notice of the great speech." In the same issue of the *Sun,* however, the editor devotes two and one-half columns to a speech delivered at Vicksburg on November 5, 1860, by one Thomas Walton, "on the occasion of a grand torch-light Democratic rally."

secession in the event of Lincoln's election. He alone distinctly sounded a note of somber warning.[45]

The main theme of Davis' addresses was that the interest of the South would be best served by uniting upon the support of Breckinridge and Lane.[46] In characteristic style, Davis maintained that a State had the right to withdraw from the Union and that in the event of secession by a State, the Federal government had no right of coercion. He declared that Mississippi should resist the "rule of the arrogant and sectional North," but he was as careful to refrain from stating what exact contingency would justify resistance as he was from stating what exact form the resistance should take. The lack of definiteness on this point, in striking contrast to the whole field of Breckinridge orators in the State, must have, in the excitement of the canvass, dulled the speeches of Davis and made them rather drab copy for the press. A special correspondent of the *Natchez Courier,* reporting Davis' speech made at Holly Springs, Sept. 24, said: "The speech of Senator Davis was an effort not equal to his fame, and gave but little satisfaction even to his friends. There was a vagueness, an uncertainty, a disconnection and a wondering about it, that indicated a screw of considerable size loose somewhere."[47] When Davis, as was his characteristic, became defiant of the North, the Democratic press seized upon "such glorious sentiment" and printed it as proof that, after all, the Democratic Chieftain was "true to the South"; that he was "a sound patriot"; and that he was not "a spiritless Union-at-any-price gentleman."[48] A case in point is that of Davis' speech at Oxford on September 28, when he said:

I am no disunionist **per se**; yet I claim that a State has a perfect right to withdraw from the Federal Union whenever it sees fit to do so, and no power on earth has a right to object.

45 Thomas H. Woods, a member of the Convention of 1861, says, with reference to the Davis' addresses delivered in the eastern section of the State during the campaign, that "with his accustomed dignity, eloquence, and argumentative power, he pointed out the impending conflict and sought to arouse the people to meet it. No one who heard Mr. Davis' impassioned yet deliberate and guarded utterances in those addresses was left to doubt that the Senator saw the gathering tempest and heard the mutterings of the coming storm, and while to some who heard him, he appeared to minimize the danger, yet to all his imperial voice distinctly sounded the note of somber warning." Publications, Mississippi Historical Society, Vol. VI, pp. 92-93.

46 Jefferson Davis to Messrs. L. P. Conner, Z. York, C. S. Magoun, Brierfield, October 7, 1860; Rowland, *Op. Cit.,* Vol. IV, pp. 540-541. Also, *Natchez Free Trader,* October 16, 1860.

47 October 10, 1860.

48 *Natchez Free Trader,* October 3, 1860 (Quoting *Oxford Mercury).*

This is the nature of the compact formed to bind the States together. Whenever that compact is broken, then it ceases to be binding. Mr. Douglas said at Norfolk that he would assist Mr. Lincoln in coercing a State should any such rebel against his administration. I have only this to say: When Mr. Lincoln leads his army here to coerce Mississippi, with Douglas as his Lieutenant-General, as the one is six feet four and the other five feet four, the yard-arms of the gallows which our people will erect for them will have to be elevated accordingly.[49]

In his speech at Vicksburg, November 3, Davis uttered a like "glorious sentiment" when he declared that

If Mississippi in her sovereign capacity decides to submit to the rule of an arrogant and sectional North, then I will sit me down as one upon whose brow the brand of degradation and infamy has been written, and bear my portion of the bitter trial. But if, on the other hand, Mississippi decides to resist the hands that would tarnish the bright star which represents her on the National Flag, then I will come at your bidding, whether by day or by night, and pluck that star from the galaxy and place it upon a banner of its own. I will plant it upon the crest of battle, and gathering around me the nucleus of Mississippi's best and bravest, will welcome the invader to the harvest of death; and future generations will point to a small hillock upon our border, which will tell the reception with which the invader met upon our soil.[50]

When, however, Davis was confronted with the specific question as to whether Mississippi would be justified in seceding from the Union in the event of Lincoln's election, he avoided a direct and specific answer and took refuge behind the resolutions of the Mississippi Democratic Convention of December 1859. In the course of his speech at Corinth, a Union stronghold, on September 21, a gentleman in the audience handed Davis a note and questions as follows:

Corinth, Miss., Sept. 21, 1860.

Hon. Jeff Davis—Sir: We a portion of your constituents, irrespective of party, are desirous, if consistent with your feelings, an answer to the following (as we conceive in the present state of political affairs) grave and important inquiries:

Question 1. If Abraham Lincoln be elected President of the United States, will the Southern States be justified in seceding from the Union?

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49 *Ibid.*

50 *Natchez Free Trader,* November 13, 1860; The *Vicksburg Whig* of November 7, 1860 quotes this passage of Davis' speech from the *Vicksburg Sun* and bitterly denounced the speech as showing "how inordinate vanity, operating upon a moderate intellect, flattered by past successes, may influence its possessor to the most inflated of self-laudation."

Question 2. If they (the Southern States) secede from the Union upon the inauguration of Abraham Lincoln, before he commits an overt act against their constitutional rights, will you advise resistance by force to their secession?

And further: In the event of the decision of any Southern State to dissolve her connection with her sister confederates, without a judicially adjudged violation of the Constitution of the United States, will it be treason for a citizen of such State to aid the Federal authority in the enforcement of the objectionable Federal law?

Regarding you, one of our representatives in the United States Senate, as having peculiar advantages in the formation of opinions, we desire plain and direct answers.[51]

The answers of Davis to the three above interrogatories were as follows:

Answer to Question 1. I suppose the first question is intended to inquire of me whether I consider Abraham Lincoln a Black Republican—for I regard myself as instructed by the resolutions of the Legislature of Mississippi, as well as the Democratic Convention of 1859, which declared, in the event of the election of a Black Republican, on the avowed purposes of that organization, Mississippi would regard it as a declaration of hostility, and would hold herself in readiness to co-operate with her sister States of the South, in whatever measures they may deem necessary for the maintenance of their rights as co-equals in the Confederacy. (He here read the resolutions.) These resolutions do not declare secession as the remedy, nor assume for the South what remedy shall be adopted; yet, it unquestionably does include a resort to that last dread alternative of separation. To this position of Mississippi, I have given, and still continue to give, my cordial assent. While I thus freely give my own opinions and sentiments, I am not prepared to say that they are the opinions and sentiments of either Breckinridge or Lane. I suppose, on the contrary, they are not, as, in my opinion, no one entertaining or expressing such sentiments could have received the nomination.

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51 The note containing these three questions was signed by R. A. Whitmore, J. J. Gibson, John Jobe, R. M. Hale, P. M. Tucker, C. W. McCord, J. C. Reed, H. C. Klyce, T. D. Barfoot, D. A. Goff, John Hughes, W. H. Moss, T. J. Shope, W. D. Soard, and James O'Neel.

The sketch of Davis' speech, together with the interrogatories with Davis' answers thereto, appeared first in the *Corinth True Democrat*, a Douglas organ, of which B. N. Kinyon was editor. The *Mississippian* seems to have been the only newspaper supporting Breckinridge and Lane that copied the account of Davis' speech appearing in the *True Democrat* and it did so without comment in the issue of October 10, 1860. The Whig press only commented on the speech.

The *Vicksburg Whig*, October 10, 1860, declared that Davis' Corinth speech branded the Southern Democrats with "moral cowardice" since "they are secessionists, but dared not nominate men who agreed with them."

Answer to Question 2. It is a matter of surprise to me that any one should suppose it necessary to ask me whether I would advise, or in any contingency consent to the use of, coercion upon the sovereign State of Mississippi. Such an inquiry can but be an insult, if such inquiry were made doubting my answer. Such an idea can only exist in the mind of one who reverses the order of things, and supposes the States to be the CREATURES instead of the CREATORS of the Federal Government. (He referred to the debates in the Convention for the formation of the Constitution, upon the proposition to give authority to the General Government to use force in the maintenance of its laws against a resisting State, when Hamilton and Madison, so often holding opposite views, concurred that the proposition should not be entertained—denominating it as one not for the formation of a Union, but for the destruction of the States.) I denounce the craven wretch who can countenance the coercion of a sovereign State by Federal authority.

Answer to Question 3. The neck of the author of such an inquiry is in danger of hemp. The allegiance of each citizen is due the State of his residence. Since one's citizenship in the United States results from his prior right of citizenship in a State, his citizenship in the United States will necessarily terminate when his State ceases to be of the Union. It is, therefore, an absurdity to hold that a citizen of a State can be justified by any extraneous authority in making war upon the State of which he is a citizen. My opinion is, therefore, that such an act would be treason against the sovereignty to whom the citizen owes his first allegiance. There can be no necessity, according to the Democratic creed, for a judicial decision giving authority to a State to declare her rights violated. For many years the creed of the Democratic party has contained the affirmative of the resolutions of 1798-9, as expounded in Madison's Reports; and he who denies the right of a State to judge in the last resort of its wrongs and the remedies to be applied, repudiates the Democratic creed, and rejects every common sense idea of State sovereignty.[52]

In so far as the available evidence throws light upon the participation of Jefferson Davis in the presidential canvass of 1860, it shows him to have been exceedingly non-committal as to what exact contingency would justify Mississippi in seceding from the Union. Eloquently defending from the stump and elsewhere, the right of secession, he was exceedingly vague on the expediency of exercising the right in the event of Lincoln's election. Unlike other Breckin-

52 The language here used, in answer to the three questions, is in the form of direct discourse instead of indirect as it appears in the *Mississippian,* October 10, 1860. Slight editing has been done in the interest of clarity but there has been absolutely no deviation from the content and meaning of the report of the speech as it originally appeared in the *Mississippian.*

ridge orators in the State, Davis maintained in his campaign speeches a reserve and a sense of proportion on the question of secession. He refused to be more specific than the State Democratic platform itself, which was pledged to nothing more than co-operation with other Southern States as to the best policy to pursue in the event of the election of a Black Republican to the Presidency in 1860. On this point the views of Davis were not essentially different from those of Judge Sharkey and other Mississippi supporters of Bell and Everett.

In Mississippi the presidential canvass of 1860, in its closing phases, assumed the proportion of a crusade characterized by evangelical fervor. The partisans of Bell and Everett, "fired by a glorious enthusiasm," appealed to "every man to do his duty," conceding nothing to Breckinridge and Lane except "the vote of South Carolina and two precincts in Smith County, Mississippi." Every Bell and Everett man was urged to "pull off his coat and roll up his sleeves" and to be up and doing until the close of the ballot-box. Barbecues, speeches, and mass meetings were declared to be of great value; but in the end victory would depend upon individual action to secure votes. "Give the people light; reveal the plottings of those who would unnecessarily plunge us into ills we know not of, and let us make one mighty, universal effort to dethrone party, and set up patriotism instead." On pain of "civil war and revolution," Bell and Everett men were urged not to neglect to visit and talk to their friends in the interest of the Union ticket:

> There are very few men in the party who cannot win a vote for the Union ticket, and a little exertion, by individuals in their daily social intercourse, will secure for Bell and Everett an overwhelming majority. Our speakers are doing good service in their department but we want workers—men who will reason with their neighbors in the field, in the workshops and by their firesides. This is the sort of work that tells, and every man who shirks from it, shirks from an important duty.[53]

The parties of both Bell and Breckinridge in Mississippi undertook, during the canvass, to make a special appeal to young men. The *Vicksburg Whig* admitted that one of the causes of the defeat of the old Whig, the American, and the Opposition or Union party in Mississippi was the tendency to keep "ossified remains" in places of power to the

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53 *Natchez Courier*, October 26, 1860; *Vicksburg Whig*, Sept. 22 and 25, and October 30, 1860.

exclusion of the young and ambitious.[54] The editor admonished the party to correct this dominant weakness and to make a special bid for the support of young men in the Presidential canvass. Young men's Union Clubs were accordingly organized and those in "the sear and yellow leaf," though having a deep and abiding interest in the preservation of the Union, put forward young men who, it was declared, would be enjoying the benefits of the Union after their elders were resting in silent graves beyond the strife and turmoils of the day." "Young men! will you see the Union of your fathers rent in twain? Will you see its Constitution torn into tatters by bands of secessional agitators and traitorous fanatics? No, NEVER, NEVER. Then buckle on your armor and go forth to do battle for the success of the Union candidates."[55] The Democratic press congratulated the Democratic party on having an inherent appeal to young men and it rejoiced in the "enthusiasm manifested" by the young men "in the State-Rights democracy and the present canvass." Lauding them as the "enthusiastic and the brave," young men, said the Democratic press, had a natural political affinity for a party of "energy," "spirit," and life." The Democratic party not being of "unmixed or doubtful" purpose, having no "uncertainty" for the future, and being "compact and unyielding" in its principles, could rely upon young men "to rally with one heart and resolute purpose" to strike blows for Southern rights.[56]

The blare of trumpets and the resounding voices of stump speakers had scarcely died away when the Mississippi electorate, on November 6, 1860, with a feeling that the "Rubicon" was being crossed; that the scales, long held in fearful equipoise, were about to be turned; that argument was exhausted and that the day of action was upon them, made, along with the voters of other States, its quadrennial treck to the polls, not, as events were to prove, to insure, as was usual, that the government should remain for four years more under the control of Southern influence but to determine that Abraham Lincoln and Hannibal Hamlin—"both bigoted, unscrupulous and cold-blooded enemies of the peace and equality of the slave-holding States, and one of their pair strongly marked with

54 *Vicksburg Whig,* June 21, 1860.
55 *Ibid.,* October 10, 1860.
56 *Mississippian,* October 10, 1860; *Vicksburg Sun,* November 5, 1860.

the blood of his negro ancestry''[57]—should become respectively the President and Vice-President of the United States. What would be the answer of Mississippi and the South?

57 *Mississippian,* October 31 and November 14, 1860; *Natchez Free Trader,* November 8, 1860.

CONSTITUTIONALITY OF THE EMERGENCY RELIEF MEASURES

By Orville F. Rush*

War against the depression is being made on all fronts. The present economic morass and the striking failure to date of spontaneous recuperative forces to manifest themselves in the field of business and industry has apparently produced widespread and growing conviction that the National Government must within the immediate future, and for some time to come, take a large hand in social and economic reconstruction. Leading economists believe that no matter how we get over the present "emergency", no lasting amelioration of our condition is possible, and certainly no prevention of the recurrence of a similar depression in the near future, unless we turn to a definite policy of social and economic planning on a national scale.

Plans advanced by Messrs. Owen D. Young, Gerard Swope, George Soule and Stuart Chase have one common feature, the abandonment of the traditional political and economic doctrines of laissez-faire, though differing in opinion as to how sharp a turn from the beaten road we must take. Voices raised in defense of the old fashioned do-nothing policy, placing reliance on the traditional "automatic" economics, are continually growing fewer in number as time passes. The Supreme Court of the United States in its decisions on the subject has, in effect, abandoned the policy of unrestricted competition in the realization that the public interest, the responsibility for the protection of which the Court keenly feels, is not best served by unbridled and unrestrained competition. As to the difficulties which face the social planner, the peculiarly American institutions of Judicial Review and Constitutional Limitations do not today assume the obstructive proportions that on first consideration might be expected because Constitutional Law today is more flexible, more free from autonomous concepts, than it has been at any time within many decades, because the Court itself is more realistically aware than ever before of the essentially legislative character of its task, more aware of its real

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freedom of choice in the presence of the vast variety of juristic materials which a century and a half of discussion and decision have made available to it, because a wider public interest is also aware of these things, and so not disposed to be unduly impressed by mystifying talk about the nature of the "judicial process."

The Justices of the Supreme Court would most likely make a firm denial of the above statement, because when the court does act as a legislative body, it speaks as if it were not a legislature but a court of law bound by unbreakable and unshakable fetters of a superior law. Recent decisions of the Supreme Court show that the Justices are ready to abandon, in some degree at least, traditional ways of doing business, and that ways of interpreting the Constitution will be found, to make the change constitutional.

This change in attitude of the Supreme Court brings up the problem of what the Justices will say and do when the constitutionality of the various relief measures being tried in Washington are questioned. Will the Supreme Court be "made" by public opinion to reverse itself? As every political and economic problem assumes a legal-constitutional aspect, and every economic project, which in any way deviates from the routine of business as it has been known in the United States since the War between the States, must run the gauntlet of the scrutiny of the Supreme Court, it has always been thought unless it meets the approval of that august tribunal "it cannot be done in this country." This is true, but advocates of the various relief measures feel that approval will be forthcoming without a struggle. Advocacy of laissez-faire theories is now considered a mark of fossilization even in good business circles. In the Oklahoma Ice Case[1] the Supreme Court took judicial notice of the depression and from the language used in the opinion, it appears that the case is the beginning of a series of decisions that will cause serious inroads to be made in our past conceptions of the Constitution. Said Mr. Justice Brandeis in his now celebrated dissent in that case:

"Economists are searching for the causes of this disorder and reexamining the bases of our industrial structure. Business men are seeking possible remedies. . . . . All agree that irregularity in employment—the greatest of our evils—cannot be overcome unless production and consumption are more nearly balanced. Many insist that there

[1] New State Ice Co. v. Liebmann, 285 U. S. 262 (1932).

must be some form of economic control. There are plans for proration. There are many proposals for stabilization. And some thoughtful men of wide business experience insist that all projects for stabilization and proration must prove futile unless, in some way, the equivalent of the certificate of public convenience and necessity is made a prerequisite to embarking new capital in an industry in which the capacity already exceeds the production schedules."

It seems that Justice Brandeis might be suggesting that the matter is up to economists and business men, but, though the initiative must come from them, they must instruct their representatives to accept some plan which would give the prevailing thought of the business community the requisite legal form and sanction. Sooner or later the Supreme Court will receive all of these plans for consideration, and having already expressed itself in the Ice Case that something must be done about the present economic crisis, as the above opinion illustrates, it appears that approval is by all means not out of the question.

To see just what situation will present itself to the Court when these various measures come before it and to justly determine whether or not it will have to act in the role of legislature ascribed to it earlier in this article, let us review the history-making events of the past few months.

With the declaration that he was acting in the interests of the people in the war on depression, President Franklin Delano Roosevelt upon assuming office on March 4th of the current year set himself up as a virtual Dictator, ordering Congress to vote away power after power, formerly jealously guarded prerogatives, into the hands of the Executive with the result that, some say, we now have an autocrat in the White House as powerful as Benito Mussolini or Adolph Hitler, and who has been compared to Julius Caesar and the indomitable Nero by prejudiced editors of small town weeklies. However, many noted writers deny that a dictatorship has been established. Mr. E. Francis Brown, in the July issue of Current History Magazine, said:

"Certainly there is no dictatorship on the Italian or German model. The President, while asking for tremendous grants of power, has been granted them by Congress within the framework of the Constitution. Presumably Congress could alter or withdraw any of these powers

whenever it might see fit. . . . . America manifests none of the chauvinism or militarism associated with Mussolini or Hitler, largely because any movement must reflect the folkways of a people, and such phenomena do not arise from the American mores.''[2]

But, some accuse the President of impinging upon the Constitution ''with as due regularity as he partakes of his daily morsels at noon-time.'' Others assert he displays as utter disregard for that great document of ours ''as though it were an initial story of a hick cub reporter about to be relegated to the well-known waste basket.'' The Conservatives, now few in number, cry out and want to know what is the constitutional basis upon which these virtually daily Presidential proclamations may operate.

It is true that Congress passed with hardly a murmur bill after bill that President Roosevelt's professors wrote for it, most of which bills gave the President power to act in a legislative capacity. Has Congress the power to delegate its functions to the Executive? The Executive frequently has to use the armed forces of the State or Nation in the performance of his duty to see that the laws are faithfully executed in troubled districts,[3] but it is a new experience to have the governors and the President take emergency measures in combatting a depression. The banking crisis, which first received executive notice in Nevada last November and which attained alarming proportions with Governor Comstock's ''bank holiday'' in Michigan, culminated in the national holiday on March 6. Other depression problems have led to the proclamation of mortgage moratoria by the governors of Minnesota and Oklahoma, to the placing of an embargo on gold and restricting withdrawals and hoarding of gold as ordered in a Presidential proclamation soon after the inauguration, the Muscle Shoals Development Act, the Home Owners Refinancing Act, the Railroad Reorganization Act, to the Cotton Acreage Act and the National Industrial Recovery Act—by which concerns engaging in interstate commerce are

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2 E. Francis Brown in the ''American Road to Fascism,'' Current History, Vol. XXVIII, page 398, July, 1933. ''Regardless of the concentration of Power in the Chief Executive, the United States has no dictatorship. Possibly dictatorship accompanies Fascism only in those countries where the Democratic tradition has been weak and where experience with parliamentary institutions has been limited. In America, a nation grounded in more than a century and a half of self-government, all that is needed is the endowment of the President with powers adequate for carrying out the economic program. Such a delegation by Congress is in line with American constitutional evolution.''

3 A consideration of the military powers of the governor and President is beyond the scope of this article.

given the choice for two years between complying with regulations to be laid down by the President under authority delegated by the act and giving up their interstate business—the Securities Act and the Farm Relief Act invoking the same idea. The latter, though a tax measure, is actually a price fixing measure and its validity may well depend upon the principle that processors pay the fees exacted by the measure for the privilege of engaging in interstate commerce. Proposals to stabilize oil production, whether by compact among the states with the approval of Congress, or more directly by national legislation, furnish other illustrations of the same general principle.

Whatever the antecedents of the New Deal, never before in our history has the government undertaken to create and supervise an ordered economic scheme. Never before has our government asserted its authority over production, prices, wages and standards of living, or itself gone into business on a large scale. In his statement explaining the Industrial Recovery Act, President Roosevelt put the matter plainly:

"In my inaugural, I laid down the simple proposition that nobody is going to starve in this country. It seems to me to be equally plain that no business which depends for existence on paying less than living wages to its workers has any right to continue in this country. By 'business' I mean the whole of commerce as well as the whole of industry; by workers I mean all workers—the white-collar class as well as the man in overalls; and by living wages I mean more than a bare subsistence level—I mean the wages of decent living."[4]

Mr. Roosevelt may justify these relief measures by the "national emergency clause" already mentioned, by the power to regulate business affected with a public interest and the power to regulate commerce among the states. The two latter powers are meant for the legislative branch of the government and not the executive, but perhaps, Mr. Roosevelt feels that inasmuch as he has already stripped Congress of most of its legislative powers he has the right to utilize both powers ascribed to the executive and legislative divisions of the government. However, this attitude is arousing the wrath of the Conservatives to near fever pitch. Judging from statements that have been issued from the Conservative camp of recent date, it seems that they feel that if the only way to fight the depression

[4] Henry Steele Commager in "Farewell to Laissez-Faire," Current History, Vol. XXVIII, page 518, August, 1933.

is by way of reading into the Constitution phrases that "would cause its authors to turn over in their graves, words that do nothing less than nullify it," then, they say, wait until a more propitious time, wait until all relief measures that are constitutional have failed and there is nothing left to do but tear up the Constitution and revert to a government with a King at its head.

It is true it has gotten to the point where Congress cannot enact a law. There is no longer any such thing as "Be it enacted by the Congress of the United States" that such and such a thing is the law. It is no longer true that if a certain thing is declared by the Congress of the United States those letters and those terms and those figures and words mean what they say. But, if we take the meager accomplishments of previous Congresses into consideration, who can say that it is a bad experiment? Some economic writers assert that the only way to do anything in Congress now is to authorize the President of the United States to suspend the Constitution and the anti-trust laws and everything else that the people are living under and give him authority to do something. Mr. William Kay Wallace in his recently published book "Our Obsolete Constitution," makes a plea for a new form of government and new ideal of public law in the United States, in view of the tremendous and far reaching changes of policy being made at the present time in our government. His entire plan is a remarkably ingenious combination of ideas selected from institutions of the Fascist Corporative State and the Soviet form of government, together with some original, or at least untested, devices of social control. But of more immediate interest to the lawyer is the author's justification of the title of his work and the basis of his allegation of the necessity of a change in our concept of the nature and function of the State. He feels that the individual political rights idealized by the framers of the Constitution are now valueless, that the Constitution itself has become a document of self-contradiction with such socializing appendages as the Sixteenth, Eighteenth and Nineteenth Amendments tacked to its individualistic body. It follows, then, that, individual rights and interests being dead and valueless, their place in the legal order must be filled; and by what more obviously than by a recognition and effectuation of a body of social interests? In order to bring about such an order of things, it is necessary to revise not only our ideas of social control, but also the

instrument by which we express and give effect to these ideas.

Some of these ideas may fit in with a certain group of students of Constitutional Law, but such a course of argument betrays a lack of understanding of what may be called the spirit of Anglo-American public law, especially that part of it which consists of expounding the American Constitution, as may be gathered from opinions of the Supreme Court justices handed down for several decades, especially in cases since *Munn v. Illinois,* decided in 1876.[5] The book indicates a belief that our public law is fashioned from a set of rigorously formal ideals such as prevail in Continental Europe. It fails to recognize that American public law is not a body of abstract concepts, cast as in a die and immobile from the day of their inception, but is a living, growing organism, always capable of adapting itself to conformity with changes in public ideals, as pointed out at the beginning of this article. Mr. Wallace makes the following statement for us to ponder over:

"Natural rights are no longer regarded as independent of the law, as superior to legislative enactment. In spite of the fact that the Constitution in its early amendments professes to guarantee them, later amendments have completely reversed this policy, so that today we have in the same document provisions that contradict each other. The Supreme Court itself no longer renders decisions in strict accordance with the fundamental principles of the Constitution. When on occasion it still does so, it becomes strikingly apparent how obsolete ideas of inherent, inalienable natural rights have become."

A tracing of the path of actual decision which, after all, is the path of the law, will reveal that abstract ideals are the least of the elements which take part in its formation. However much the framers were impressed with the importance of "natural rights", the Supreme Court does not, and has never felt itself bound thereby. Constitutional decisions are made, not by measuring abstract principles of law up against a body of equally abstract rights, but by analyzing and weighing tangible facts and determining whether they are the sort of thing referred to by the written words of the Constitution, and if so, what the reference is. However, some of the most rabid opponents of Mr. Roosevelt and his many proclamations that seem to impinge on the Constitution feel that individual political rights will

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5 94 U. S. 113, 24 Law Edition 77.

become non-existent if the Supreme Court places its stamp of approval on those executive orders, and agree with Mr. Wallace on many points. Mr. Wallace offers the carrying out of his ideas as an alternative to chaos, and if conditions do not improve under the present regime, it is impossible to say that the order of things described in "Our Obsolete Constitution" will not be a reality.

Fear is now being expressed that if the present order of conditions continue, Mr. Roosevelt will grow so powerful that there will no longer be a legislative branch in the government and that the judiciary will become subordinate to the executive by declaring all Presidential orders constitutional, feeling that they are acting in the interest of the country. Many in Mr. Roosevelt's own party have given vent to their feelings on this subject. Senator Huey P. Long, of Louisiana, is one of the most critical of his opponents. On Wednesday, June 7, Mr. Long made the following remarks on the Senate floor:

". . . . But before we allow Mr. Roosevelt to become too powerful a Dictator and before we give him any more authority we should first inquire of him, 'What did you do with the last trust that we imposed in you? What did you do with the bank law, in which Congress gave you dictatorial authority, except to freeze up $8,000,000,000 of bank deposits? What did you do with the reforestation sapling bill except to purchase 200,000 sets of kits and pay, on a subordinate's order, $1.40 for something that the Army refused to buy for 85 cents? What did you do with the Veteran's Compensation Law that you told the country was going to be administered in a non-partisan, merciful manner, except to throw people out of the hospitals in their underclothes, men who stood and served the purpose of stopping bullets across the seas and who had been afflicted with fatal diseases? What did you do with them except to put them at the mercy of the world, so that they are crying aloud for a crust of bread or anything on God's earth?' With that kind of examples of administration those who are cognizant of the facts will not favor giving additional powers to the Executive or will not favor lodging these powers in his hands until he has had time to correct the maladjustments that already have prevailed under which Congress has already authorized."[6]

A lengthy acrimonious discussion in both houses of

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6 5276 Congressional Record of 73rd Congress, First Session Senate, Wednesday, June 7, 1933.

Congress followed the reading of the following section of the National Recovery Act:

"The President may delegate any of his functions and powers under this title to such officers, agents and employees as he may designate or appoint, and may establish an industrial planning and research agency to aid in carrying out his functions under this title."

This was termed another evil of granting legislative powers to the Executive in that it gives him power to have thousands of agents all over the country to regulate prices and run our businesses for us. One Senator vehemently declared that this presents an opportunity to the agents to violate the Constitution so often that suits cannot be adjudicated fast enough to give proper relief to the injured party. Another stated that with all of the power lodged in the executive branch of the government the people have no one to represent them and fight for them.

After having considered the "fears", let us turn to the brighter and more optimistic side of the picture. Said Representative Ralph F. Lozier, of Missouri, on the floor of the House, Friday, June 9:

"This leads me to say that the American people, after having been asleep at the switch for 12 years, awakened in November 1932 and took our Government from the control of a few economic buccaneers, who were exploiting it, and restored it to the people. In President Roosevelt we have a leader who can be trusted to protect the interests of the masses and not deliver our Government bound hand and foot to the special-privilege groups.

"In this period of peril, Franklin D. Roosevelt is the hope of the Nation, and under his bold leadership 125,000,000 sorely oppressed people will triumphantly emerge from the wilderness in which they desperately and despairingly wandered for 12 years under the administrations of Presidents Harding, Coolidge and Hoover."[7]

The above is the situation as it exists today. Virtually all of the legislative matters are now firmly entrenched in the palm of the hand of the President. Will the judicial branch of the Government give way to the executive branch believing that it is for the best interests of the country, as some students of economy and Constitutional Law think, so that we will have only one powerful Executive instead of three divisions of the government supreme in their own field of work, or will the Supreme Court assume the role

[7] Extension of Remarks of Hon. Ralph F. Lozier in House of Representatives, 5917, 5918 Congressional Record, Friday, June 9, 1933.

of legislature, as hinted at the outset of this article? In pondering over these important questions, let us review the history of decisions of executive power in emergencies, those cases involving "business affected with a public interest," and Congress' power to "regulate commerce among the states."

It is nothing new for the President of the United States to exercise important executive power in emergencies. The prompt and vigorous action of President Lincoln at the start of the Civil War is a clear example. Lord Bryce in "The American Commonwealth" declared with reference to the Civil War that the President would always take similar action in emergencies. That his observation was prophetic of executive action in peace-time emergencies may be doubted. Congress could perhaps authorize the President to act in emergencies, but this raises the same grave question of policy as is raised by our constitutional problem: the desirability of vesting so much power in the executive. It is possible that permanent statutory provisions authorizing executive action to deal with emergencies might give rise to the possibility of arbitrary action. On the other hand, it may be that the fact that the Executive is compelled to act without authority when the need seems to him to be imperative is a salutary check on arbitrary power. It is probable that the legislature would only validate such unauthorized acts as were motivated by patriotism and imperative necessity. At the present there is no one statute on the books which does confer broad emergency powers of this sort. After the Banking Holiday, Congress passed a statute with reference to the power of the President to deal with future financial emergencies.[8] The trend of legislation in the Seventy-third Congress seemed to be to confer a broad character with reference to specific objects. President Roosevelt, in making his banking proclamation, relied upon a section of Trading with the Enemy Act.[9] But this act affords a very doubtful basis for Executive action in peacetime emergency; rather it seems that the President's

8 73rd Congress Public Acts No. 1, 10 Com. Clearing House, Fed. Reserve Act Service 1691 (1933).

9 The Proclamation referred to 40 Stat. 415 (1917), U. S. C., tit. 50, sec. 5(b) (1926). The whole act was designed to deal with wartime situations, and, indeed, a part of the very section relied upon specifically limited the power of the President to license transactions in government securities to a period of two years after the termination of the war with Germany. The courts have construed the act in its entirety as strictly a war measure which finds its sanction in its power to declare war. Stoehr v. Wallace, 255 U. S. 239 at 241-242 (1921).

power, if sustainable, must be implied from the Constitutional grants of power to him as Chief Executive.

Very little may be gained from the recorded debates of the Constitutional Convention to indicate the meaning which the framers intended for the grant of executive power, and apparently the faithful execution clause was not discussed at all. Warren in his book "Making of the Constitution" declares that this provision was not discussed in the Convention. James Wilson, who was one of the advocates of an independent and responsible Executive, expressed the view that strictly executive power included only the execution of the laws and appointment of officers. The Supreme Court has said that the power conferred upon the President and the authority and sovereignty of the British Crown are so widely different that the analogy of the powers of the Crown may not be used in determining the rights and powers of the President.[10] In *Ex Parte Grossman,*[11] a 1925 decision from the Supreme Court, it was said that this is not inconsistent with the rule of construction to the effect that the language of the Constitution cannot be interpreted safely except by reference to the common law and to British institutions as they were when the instrument was framed and adopted. James Wilson thought that the prerogatives of the British Crown were not a proper guide in defining executive power because some of them were not of a legislative nature. One of Madison's suggested powers was "to carry into effect the national laws." Alexander Hamilton thought that incidental power was to be implied from the nature of the executive office. John Marshall, while a member of the House of Representatives, contended that the President had the discretionary power to execute the terms of a treaty if there was no legislation determining details of the execution. Story reaffirmed these views of implied incidental powers.[12] Warren concludes that the Constitutional Convention intended to grant to the President only the specific powers named in Article 11 and incidental powers implied from each.

Lincoln, more than any other President, had emergency conditions to meet without having statutory authority for executive action taken. The enlargement of the Army and Navy and the suspension of the writ of habeas corpus were questionable, and Lincoln admitted that the enlargement

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10 Fleming v. Page, 9 How. 603 at 618 (1850).
11 267 U. S. 87, 108.
12 3 Story, Commentaries on the Constitution 419-420 (1833).

of the Army and Navy was beyond his authority.[13] Lincoln's own justification was that the national safety imperatively required the measures to be taken and that he hoped that Congress would subsequently approve the acts. But the actions of Lincoln do not afford a clear indication that the grant of executive power to the President vests additional authority. Lincoln himself believed that many of his acts were taken without constitutional authority.

Many Presidents have made critical estimates of the executive powers of the President. Benjamin Harrison believed that the central idea of the office was the clause: "He shall take care that the laws be faithfully executed." He recognized that this clause afforded a comprehensive and discretionary power in the enforcement of the laws. Cleveland expressed the view that the members of the Constitutional Convention were not willing that the executive power should be cramped and embarrassed by the narrow view that the enumeration of certain granted powers and duties excluded all other executive functions. He believed the framers supplemented the special grants with the "faithful execution" clause. Theodore Roosevelt had a very liberal view, saying that the President had inherent executive powers and a large measure of inherent legislative power, and that the President might act in a national emergency without finding a basis for his authority, unless there was some prohibition against it by the Constitution or laws.[14] Taft differed with Roosevelt: "The true view of the Executive's functions is, as I conceive it, that the President can exercise no power which cannot be fairly and reasonably traced to some specific grant of power or justly implied and included within such express grant as proper and necessary to its exercise. Such specific grant must be either in the Federal Constitution or in an act of Congress passed in pursuance thereof. There is no undefined residuum of power which he can exercise because it seems to him to be in the public interest. . . ."[15]

These four Presidents agreed that the Executive has a choice of means and discretion in the enforcement of the law, but they do not agree on the question whether the grant of executive power and the imposition of the duty to execute the laws involves an implication of additional general power.

13 Randall, Constitutional Powers under Lincoln 51 (1926).
14 Roosevelt, An Autobiography 394-395 (1913).
15 Taft, Our Chief Magistrate and his Powers (1916).

Myers v. United States[16] is the most recent opinion touching the question of the President's implied power. The difference in the phrasing of the grant of power to the President and Congress was mentioned in this case. The language of the Constitution with reference to the President is that the "executive power shall be vested in a President of the United States of America";[17] but the grant of power to Congress is that "All legislative powers herein granted shall be vested in a Congress of the United States."[18] From this it may be seen that all power which is executive in nature is in the President, while it confers on Congress only enumerated legislative powers. Chief Justice Taft in his opinion in the Myers Case said that the grant of executive power carries an implication of incidental powers. The fact that the scope of "executive power" has not been definitely settled offers an opportunity for a present day liberal interpretation based on the need for implied power.

In the famous case of *In re Neagle*[19] the result indicated conceding of the point that the President has power to formulate executive policies in the enforcement of any constitutional provisions if Congress has not legislated concerning the matter. However, later Judge Augustus Hand in distinguishing the Neagle Case and the President's censorship of radio stations in 1914[20] did not concede that the President is vested with such power because the United States is a sovereign nation and must be deemed to have all customary national powers, or that the failure of Congress to exercise its undoubted powers enables the President to do what Congress might have authorized. He said that recognition of such a theory would enable the President to completely control foreign commerce, in the absence of congressional legislation.

It seems that of the two arguments, Judge Hand's was somewhat stronger. Congress is vested with the power of making all laws necessary and proper for carrying into effect all powers granted throughout the Constitution, and it does violence to constitutional theory to maintain that the President may formulate an executive policy based upon a provision of the Constitution which pertains to some other department in the face of the silence of Congress.

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16 272 U. S. 52 at 128 (1926).
17 Const. Art. 11, Sec. 1.
18 Const. Art. 1, Sec. 1.
19 135 U. S. 1 (1890).
20 30 Opinions, Atty.-Gen'l, 291 at 292 (1914).

Does the President's implied power, derived from specific functions imposed by law or the Constitution, include power to act in peace-time emergencies? Does he have the power to meet a banking crisis? The exercise of control over banks outside of the Federal Reserve System and beyond Federal control is a very doubtful exercise of executive power incidental to the execution of existing laws. If constitutional or statutory basis for the President's executive action be lacking, the President may act, as Lincoln did, with the realization that he has no authority; he may act with the expectation that Congress will ratify the action taken. If the Chief Executive is unable to find a basis in the Constitution or laws for implying power to deal with emergencies, his unauthorized acts may be ratified by legislation if legislation could have authorized the executive action taken. Of course, most of the measures since the Bank Holiday were given the stamp of legislative approval. But has Congress the power to delegate such legislative functions to the Executive? A discussion of this material matter will be taken up later in this article.

Let us now consider those cases involving "business affected with a public interest." In 1670, Sir Matthew Hale, then Lord Chief Justice of the King's Bench of England, concluded an essay on the ports of the sea and put it away among his private papers. Approximately 100 years later, this essay, together with another of Lord Hale's, was presented to Francis Hargrave, Barrister at Law. He was so struck with their value that he entertained the project of publishing them along with some other manuscripts in a collection of law tracts. In 1787 Hargrave's Collection of Tracts Relative to the Law of England was presented to an indifferent bar. Of these, the principal tract was a treatise by Lord Chief Justice Hale in three parts, of which the second is the essay De Portibus Maris. In a now famous paragraph which occurs therein, Lord Hale referred to certain wharves as "affected with a publick interest."[21] Almost 100 years later, in 1876, the Supreme Court of the United States had before it legislation of the State of Illinois regulating grain elevators and, among other things, fixing the charges for the services rendered by them. This legislation had been challenged as violative of the Fourteenth Amendment of the Constitution. This case, *Munn v. Illinois*,[22] has long been considered

21 Hargrave, Law Tracts 77-78.
22 94 U. S. 113 (1876).

a landmark in our Constitutional Law and the phrase "affected with a public interest" was first used by the Supreme Court of the United States through Chief Justice Waite, speaking for the majority of the Court:

"This brings us to inquire as to the principles upon which the power of regulation rests. . . . . Looking, then, to the common law, from whence came the right which the Constitution protects, we find that when private property is 'affected with a public interest, it ceases to be juris privati only.' This was said by Lord Chief Justice Hale more than two hundred years ago, in his treatise De Portibus Maris, 1 Harg. Law Tracts, 78, and has been accepted without objection as an essential element in the law of property ever since."

Fifty years later Mr. Justice Sutherland, speaking for the Court in the case of *Tyson v. Banton*,[23] said that "Lord Hale's statement that when private property is 'affected with a public interest, it ceases to be juris privati only,' is accepted by this court as the guiding principle in cases of this character."

It is significant that *Munn v. Illinois* is not even cited in Mr. Justice Sutherland's opinion in the Oklahoma Ice Case,[24] nor in any of the cases subsequent to *Tyson v. Banton*. It seems that the reason was that the concept of public interest has had to travel a rather hard and bumpy road, being all but repudiated by the "liberal" judges in the process, and that the doctrine first announced was being perverted to a use exactly opposite from that for which it was there used, and a meaning was being given it exactly the reverse from that which it certainly had when Lord Hale first used it.

In view of the subsequent history of the doctrine, it is important to point out that the business regulated by the statute in the Munn Case did not involve any franchise or monopoly. The owners of the elevators or warehouses were not given any grants or privileges of any kind by the public; nor were they using any public street or other public property in the business. Nor did any individual, firm or corporation, have a monopoly of the business. Anyone had a right to go in the business. Chief Justice Waite, in referring to the strategic position of the elevators situated at Chicago, said that they may be a "virtual monopoly," but the context shows that he used these facts to explain why the public should be interested in the regulation of the

23 273 U. S. 418 (1927).
24 Supra Note 1.

business. And if there were any doubt on the subject, it was conclusively removed in the later case of *Brass v. North Dakota,*[25] in which the Supreme Court upheld the North Dakota statute regulating grain elevators and warehouse charges under circumstances which excluded the monopoly feature.

It was understood by those who opposed the Munn decision that legislative interference is proof of public interest. Mr. Justice Field opens his dissent with the following statement:

"I am compelled to dissent from the decisions of the Court in this case, and from the reasons upon which that decision is founded. The principle on which the opinion of the majority proceeds is, in my judgment, subversive of the rights of private property, heretofore believed to be protected by constitutional guaranties against legislative interference, and is in conflict with the authorities cited in its support."

Later Mr. Justice Peckham took the bold course of attacking not only the decision in *Munn v. Illinois,* but also the entire doctrine of affectation with a public interest as laid down by Lord Chief Justice Hale. His attack came in *People v. Budd,*[26] a New York case, when he was Judge of the New York Court of Appeals. This case, like the Munn Case, involved grain elevators. Judge Peckham seemed dissatisfied with the showing Mr. Justice Field made in attempting to fasten the doctrine upon Lord Hale, but also the argument he presented in opposition to the United States Supreme Court's decision in the "railroad rate cases," which were decided at the same time with *Munn v. Illinois.* He led the attack all along the line against the "pernicious doctrine" unearthed by Justice Waite.

The next important case in the development of the doctrine was that of *German Alliance Insurance Co. v. Lewis.*[27] This was decided during the Progressive Era, 1914, and bears all of the earmarks of decisions of that period. The liberal majority of the Court muffed all questions of principle by tacitly adopting Judge Peckham's constitutional theory, but rejecting his economics. It stressed the fact that constitutional power is a matter of degree. The net result was to make the Supreme Court what Peckham and Field had contended for—a super-legislature. This gave the advantage to the conservatives as

25 153 U. S. 391 (1894).
26 22 N. E. 670 (1889).
27 233 U. S. 389 (1914).

they became the guardians of both pure and pristine common law and the sacredness of the Constitution. The application of this general attitude to the problem was the giving up of Lord Hale's doctrine of affectation with a public interest, and the emasculation of the Munn Case.

The final chapter was written in *Tyson v. Banton.* The work begun in the German Alliance Case came to its full fruition. In the Tyson Case Mr. Justice Holmes, for the Liberals in their dissent, all but repudiated the Hale doctrine, while Mr. Justice Sutherland, as leader of the conservative majority, planted himself squarely upon it. *Munn v. Illinois* had been transformed in the process. Mr. Justice Sutherland adopted a tripartite formulation of the doctrine of affectation with a public interest from the Wolff Packing Co. Case.[27a] In that case Chief Justice Taft had said that businesses clothed with a public interest fall into the following three classes:

"(1) Those which are carried on under the authority of a public grant of privileges which either expressly or impliedly imposes the affirmative duty of rendering a public service demanded by any member of the public. Such are the railroads, other common carriers and public utilities.

"(2) Certain occupations, regarded as exceptional, the public interest attaching to which, recognized from earliest times, has survived the period of arbitrary laws by Parliament or Colonial legislatures for regulating all trades and callings. Such are those of keepers of inns, cabs and gristmills. . . . .

"(3) Businesses which though not public at their inception may be fairly said to have risen to be such and to have become subject in consequence to some government regulation. They have become to hold such peculiar relation to the public that this is superimposed upon them. In the language of the cases, the owner by devoting his business to the public use, in effect grants the public an interest in that use and subjects himself to public regulation to the extent of that interest although the property continues to belong to its private owner and to be entitled to protection accordingly."

This is Mr. Justice Field all over again, except in a less rigid formulation which has the great advantage of not requiring a formal reversal of *Munn v. Illinois,* and the advantage of being in consonance with the "spirit of the times," which requires that judges of the Supreme Court

27a 262 U. S. 522 (1923).

should be aware of the fact that they are legislators. They must therefore operate with more flexible concepts than was contemplated by the traditional Marshall-Story theory of our Constitutional Law.

New State Ice Co. v. Liebmann,[28] the latest case involving the doctrine, may be distinguished from the earlier decisions in that in all of the discussions of the subject from *Munn v. Illinois* to the eve of the decision of the Oklahoma Ice Case the emphasis was upon that part of the regulation of business which dealt with price fixing. Lord Hale's use of the phrase "affected with a publick interest" was used in connection with charges or rates, although it was stated in general terms and would apply to all forms of regulation. At common law no one had an absolute right to engage in any business or occupation which dealt with the public at large except by the permission and under the regulation of public authority. Therefore, as far as the right to declare regulatory legislation, such as is involved in the Ice Case, is based upon the claim that the United States Constitution enshrined certain common law principles, which are beyond the reach of state legislatures, clearly the contenders are out of court.

To discuss another point in connection with the Ice Case, let us refer again to Mr. Justice Brandeis' dissent:

"The Oklahoma statute makes entry into business of manufacturing ice for sale and distribution dependent, in effect, upon a certificate of public convenience and necessity. Such a certificate was unknown to the common law. It is a creature of the machine age, in which plants have displaced tools and businesses are substituted for trades."

While it is true that the certificate of public convenience and necessity, properly so-called, was unknown to the common law, it was actually in use in England for centuries under common law principles, the same principles laid down by Lord Hale. It is doubtful that the Constitution perpetuated the common law forever as the law of this country, but the constitutional theory which seems to have been recognized since the Munn Case seems to be the other way. Both Liberals and Conservatives look at the common law as the source of our constitutional rights. The common law is really on the side of the Liberal faction and sanctions regulations undreamed of by those who framed the Oklahoma Ice statute. One writer boldly asserted that even Norman Thomas' planning could be brought within the

[28] 285 U. S. 262.

principles of the common law. This would seem to indicate that the various relief measures under consideration, economic planning, et cetera, are constitutional. But the Constitution is what the judges say it is and the Supreme Court is the ultimate tribunal, though the Court has spoken against flexible rules of interpreting the Constitution.

The National Industrial Recovery Act brings up the question of Congress' power to prohibit commerce. Does the power to regulate commerce which is vested in Congress by the Constitution comprise the power to prohibit it by delegating authority to the President to make rules and regulations by which concerns engaging in interstate commerce are given the choice of complying with these rules and regulations and giving up their interstate business?

Since the Wilson Act of 1890, subjecting intoxicants upon their "arrival" in a state to the laws thereof, Congress has enacted many measures which fulfill the description of "prohibition of commerce." The Anti-Lottery Act of 1895, the Pure Food and Drug Act of 1906, the Commodity Clause of the Hepburn Act of 1906, Mann Act of 1910, Webb-Kenyon Act of 1913, Child Labor Act of 1916, Federal Quarantine Act of 1917, Read Bone-Dry Amendment of 1918, Federal Motor-Vehicle Act of 1919, Hawes-Cooper Act of 1929 and other acts which fall in the same catagory, with the exception of the Hawes-Cooper Act which is not yet operative and the Child Labor Act which was declared unconstitutional—all of these measures excluded from the channels of commerce things and in one case persons. They were termed "illicit subjects of commerce" but the terming of them as "illicit" was usually the outgrowth of legislative history in which the subjects affected lost reputation.

It has been suggested that the Tenth Amendment interposes a bar, but this argument loses most of its fire when we consider that the powers which it recognizes as "reserved to the states respectively or to the people" are reserved conditionally on their not having been delegated to the United States, and by the "supremacy clause," if a state in the exercise of its "uncontroverted powers" and Congress in the exercise of any of its powers, come into conflict through an effort to control the same subject matter simultaneously, it is Congress whose will has the right of way.[29]

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29 Gibbons v. Ogden, 9 Wheat. 1, 210, 211 (U. S. 1824).

In *Farmers' Loan and Trust Co. v. Minnesota,*[30] the Supreme Court said that "Primitive conditions have passed; business is now transacted on a national scale." The trend of modern minds seem to be in that direction, but there are others who still cling to the belief that we should safeguard such preeminent values as entitle it to control the interpretation of the text of the Constitution even to the extent of superceding its logical import. The Constitution sets up as its foremost objective "a more perfect Union." There are those who feel that legal and governmental development has lagged and that law and government must quicken their pace if permanent disaster is to be avoided. But will we have a more "perfect Union" by sanctioning the delegating of legislative power to the Executive? Will we be in a better economic situation by trying experiments that many believe may tear down the Constitution and the nation with it?

The question presented by the Recovery Act is whether, in the present emergency, business in general may be said to be affected with a public interest justifying direct regulation. In times of economic crises—1893, 1907, 1916, and 1929-33—it has been recognized that the general attempt to maintain the competitive system does not succeed in promoting the flow of commerce. It is felt that some other form of regulation is needed and that this act is an attempt to meet that need. Just as direct regulations were upheld in the Olsen and Tagg Bros. Cases[31] on the ground that economic conditions burdening and interfering with interstate commerce caused particular businesses to be affected with a public interest, so in the general economic crisis which is now upon us, direct regulation of all business may logically be upheld upon the same ground.

That an economy emergency may clothe business with a public interest which might not be so characterized but for these conditions, is well established. In *Block v. Hirsh,*[32] the Court said:

"The general proposition to be maintained is that circumstances have clothed the letting of buildings in the District of Columbia with a public interest so great as to justify regulation by law. Plainly circumstances may so change in time or so differ in space as to clothe with such

30 280 U. S. 204 (1930).

31 Board of Trade of City of Chicago v. Olsen, 262 U. S. 1 at 40 (1923); Tagg Bros. and Moorhead v. U. S., 280 U. S. 420 at 436 (1930).

32 256 U. S. 135 at 155 (1921).

an interest what at other times or in other places would be a matter of purely private concern."

In the Oklahoma Ice Case, Justice Sutherland recognized that where the prosperity of an entire state depended upon a business, that business was affected with a public interest. If the Supreme Court accepts the declaration of Congress and the President that a national emergency exists, in view of previous decisions, sanction may be given to the Recovery Act on the ground that it is a measure upon which the prosperity of the nation in large measure depends. But the Conservatives will say, even if the prosperity of the nation does depend upon its approval, that the Act should be put into force through Congress and not through the executive branch of the government, and that the provision giving the President power to prescribe regulations should be stricken from the Act so that Congress can regulate interstate commerce, as it has always done since the adoption of the Constitution.

The question of validity of the gold clause has been brought into the foreground of economic issues. The money powers and the due process limitations concern this question.

Under the Legal Tender Acts[33] paper currency was made a legal tender for "debts," but the Supreme Court held that the acts were intended to include only simple debts, excluding contracts in which the medium of payment was specified. In upholding the Act in *Knox v. Lee,*[34] the Court stated that Congress has power to impair contracts in the exercise of its lawful powers but avoided a finding of impairment by holding that money contracts are made subject to regulation of the currency. The Court made it clear that it was referring only to contracts in which the medium of payment had not been specified. Consequently, it follows that there is no precedent that the money power, *per se,* is the power to declare the paper currency a legal tender for obligations expressly limited to payment in gold. The sovereign money power of the English government is that extensive. Possibly the Court will uphold the statute to nullify gold clauses, without considering the question of an interference with the government's lawful objectives, on the ground that all money contracts, notwithstanding express words of limitation, are made subject to the ex-

33 First of the Acts was passed Feb. 25, 1862, 12 Stat. 345.
34 12 Wall. 457, 548 (U. S. 1870).

ercise of the power of Congress to declare what constitutes money. This opinion shades into the question of interference. Money powers include power to establish a sound and uniform national currency and to destroy that which competes with and thereby discredits such currency. This applies alike to the power to coin money and the power to borrow money, to the end that the currency system may be controlled and that the government may finance itself. So far the scope of the two powers has been determined and their objectives have been defined; so if the gold clause does in fact constitute an interference with the ability of the government to perform these functions, or to accomplish the objectives embraced in a composite of powers, then under the doctrine of implied powers and cases involving the due process clause it is subject to the exercise of the powers with which it interferes.

Reasonableness of legislation being the test of the relation of means to end which the due process clause requires, it seems that the Supreme Court would sustain an act of Congress nullifying gold clauses if the Court were persuaded that it was designed to obviate an interference with an objective embraced in the delegated powers. Attainment of such objectives may be more difficult in periods of emergency than in normal times. Scope of the powers may be enlarged accordingly. The Supreme Court has indicated that Congress is the judge of the existence of such an emergency. If the gold clause constitutes an interference with a lawful objective in recurring crises, it should be considered a permanent obstruction.[35] But the real question for consideration is that of the appropriateness of such legislation to the objects embraced in the delegated powers. In the Olsen Case, the Court accepted the findings of Congress that transactions in grain futures obstruct interstate commerce, thereby indicating that it will be guided by the findings of Congress.

"It is clear from the citations, in the statement of the case, of evidence before committees of investigation as to the manipulations of the futures market and their effect, that we would be unwarranted in rejecting the findings of Congress as unreasonable, and that in our inquiry as to the validity of this legislation we must accept the view that such manipulation does work to the detriment of producers, consumers, shippers and legitimate dealers in interstate commerce in grain and that it is a real abuse."[36]

35 Stafford v. Wallace, 258 U. S. 495, 521 (1922).
36 Supra Note 31.

Now, if Congress should find that the gold clause interferes with its ability to maintain a sound and uniform currency, the Supreme Court would probably be guided by such findings. However, Congress, as has been indicated throughout this article, is prone to heed to the command of the President, and a hurried decision without a thorough investigation in favor of the validity of the gold clause appears in the offing. Such being the case, it is not at all unlikely that the Court will follow the decision of the legislative body as it did in the Olsen case and say, "We would be unwarranted in rejecting the finding of Congress as unreasonable."

Before completing our discussion of the various major relief measures, let us consider the constitutionality of the process tax section of the Farm Relief bill. In the acrimonious debate waged in the Senate during the Seventy-third Session, Senator David A. Reed, of Pennsylvania, raised the strongest constitutional objections to the bill, and Senator John H. Bankhead, of Alabama, delivered, perhaps, the most creditable reply.

Six constitutional objections raised by Senator Reed are as follows:

(1) It fixes prices on articles that are not of public use.

(2) It taxes one citizen for the benefit of another.

(3) It gives the Secretary of Agriculture regulatory powers over business not affected with a public use.

(4) It delegates taxing power to the Secretary of Agriculture.

(5) It denies equal protection of the laws.

(6) It violates the "export clause" of the Constitution.

Senator Bankhead accepted the challenge of the Senator from Pennsylvania on the following day and upheld the constitutionality of the provisions. However, it may be best to state the Process Tax provisions before attempting to discuss the Alabama Senator's views. The provisions follow:

"Sec. 9 (a) To obtain revenue for extraordinary expenses incurred by reason of the national economic emergency, there shall be levied processing taxes as hereinafter provided. . . . . The processing tax shall be levied, assessed, and collected upon the first domestic processing of the commodity, whether of domestic production or imported, and shall be paid by the processor. . . . .

"(b) The processing tax shall be at such rate as equals the difference between the current average farm price for the commodity and the fair exchange value of the commodity; except that if the Secretary has reason to believe that the tax at such rate will cause such reduction in the quantity of the commodity or products thereof domestically consumed as to result in the accumulation of surplus stocks of the commodity or products thereof or in the depression of the farm price of the commodity, then he shall cause an appropriate investigation to be made and afford due notice and opportunity for hearing to interested parties. If thereupon the Secretary finds that such result will occur, then the processing tax shall be at such rate as will prevent such accumulation of surplus stocks and depression of the farm price of the commodity. In computing the current average farm price in the case of wheat, premiums paid producers for protein contents shall not be taken into account.

"(c) For the purposes of part 2 of this title, the fair exchange value of a commodity shall be the price therefor that will give the commodity the same purchasing power, with respect to articles farmers buy, as such commodity had during the base period specified in section 2; and the current average farm price and the fair exchange value shall be ascertained by the Secretary of Agriculture from available statistics of the Department of Agriculture."

The question was raised in the Senate that if the Process Tax were declared unconstitutional, would the remainder of the Farm Relief bill necessarily fail. Senator Bankhead contended that it would not as section 14 of the bill provided for "Separability of Provisions" in case parts are declared unconstitutional. Such argument is very weak. The Supreme Court held in *Williams v. Standard Oil Company*[37] that a separability clause will not save an entire law from being unconstitutional if the invalid part is the "axis" of the law. No one should question the fact that the Process Tax is the essential element of Title 1 of the law. If the Process Tax is unconstitutional, the rest of Title 1 necessarily fails, for there would be no funds with which to carry out the relief provisions.

The Federal Government is a government by operation of delegated powers. The Tenth Amendment reserves the remainder to the states or to the people. Can the Federal Government find support for the operation of this statute in the Constitution? The most logical basis would be in the

37 278 U. S. 235.

taxing power. But the tax must be for a public purpose, as was laid down in *Loan Association v. Topeka.*[38] If we follow the Bankhead argument, we could say that since the obligation of the United States, whether moral or legal, to the farmer is incurred prior to the collection of the tax from the processor, the tax may be collected as a tax to pay the debts of the Federal Government.

This would be looking at the surface only and disregarding the substance, as it depends upon the brief lapse of time existing between the sale of the goods by the farmer to the processor and the collection of the tax from the latter person, and would be an attempt to tax A for the benefit of B.

It is difficult to say that the purpose is a public one, upon the ground of past practice. To try to bring the law under the emergency cases such as *Block v. Hirsh,* which involved rent laws; and *Wilson v. New,*[39] upholding the Adamson law which fixed hours of labor and temporary wage scale between railroad employer and employee to prevent shutting down of the railroads just prior to the World War, is to assert a proposition far reaching in its effect. It seems that the tax is an attempt at price fixing under the guise of taxation and as such it interferes with the reserved power of the states. This contention is in line with the Supreme Court's decision in *Hammer v. Dagenhart,*[40] the famous Child Labor Case. There the Court said:

"The Act in its affect does not regulate transportation among the states, but aims to standardize the ages at which children may be employed in mining and manufacturing within the states. . . . ."

The Supreme Court held in *Hill v. Wallace*[41] that the statute imposing a tax on contracts for the sale of grain for future delivery but excepting certain boards of trade which were to be designated by the Secretary of Agriculture was unconstitutional on the ground that it was regulation rather than taxation.

The tax cannot be upheld under the commerce power of the Constitution because the Process Tax provisions apply equally whether the goods to be processed are to be shipped in interstate commerce or are grown, processed, sold and consumed entirely within the confines of one state.

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38 20 Wall. 655.
39 243 U. S. 332.
40 247 U. S. 251.
41 259 U. S. 44.

The argument that Senator Reed puts forward that "it delegates taxing power to the Secretary of Agriculture" is not without basis. This is a delegation of legislative taxing power to the executive branch of the government, and Congress did not legislate on the matter as far as is "reasonably practical." This bill was another of President Roosevelt's experiments and was passed by a Democratic majority in record time.

The Senator's next assertion that it denies equal protection of the laws is good if Congress has not the power to levy this tax under its taxing powers. However, his last contention is poor. It does not violate the "export clause" of the Constitution, as it is clearly established that the prohibition against placing a tax on exports from a state relates solely to exports to a foreign country and has no bearing on shipment of goods from one state to another.[42]

As has been stated frequently throughout this article, the President and his power over the people, press and Congress will probably liberalize the Supreme Court sufficiently to declare all of these emergency measures constitutional, and such being the case, the Justices are due to fall in line on the Process Tax also and approve it. But the Fifth Amendment restricts the United States in the same manner that the Fourteenth restricts the states; the Process Tax is clearly a price fixing arrangement, and under all precedents it should be declared unconstitutional.

Before concluding this article, let us discuss succinctly some of the other important emergency relief acts—viz., the Agricultural Adjustment Act, the Securities Act, the Tennessee Valley Adjustment Act and Muscle Shoals Law, the Railroad Relief Act and the Home Owners Refinancing Act of the Farm Relief bill.

The Agricultural Adjustment Act proposes an artificial increase in the price of agricultural commodities and the limitation of acreage through governmental regulation. The Secretary of Agriculture is given broad powers over agriculture and farm products. The purpose is to bring agriculture under planned control. The main complaint is that with millions of people on the verge of starvation the only thing the Government can think of doing with the surplus farm products is to eliminate them.

The Securities Act has already been mentioned. Briefly,

42 Dooley v. U. S., 183 U. S. 151.

it grants to the Federal Government prohibitive powers over traffic in securities in interstate commerce and, in effect, involves governmental supervision of the entire security business of the nation, as the Glass-Steagall bill does of the loans and investments of banks.

Through the Muscle Shoals Law, the Government proposes to carry out a great scheme of both social and economic planning the like of which has never been seen in the United States. Less than a decade ago such a measure would have been unthinkable. The Tennessee Valley Development Act is the most far reaching attempt at conservation and rehabilitation ever undertaken, places the Government squarely in the power, explosives and fertilizer businesses, and makes it directly responsible for the economic and social life of an immense region.

The Railroad Relief Act gives to a Federal coordinator of railroads extensive powers to eliminate wasteful competition, merge transportation facilities and reduce top-heavy capitalization.

The provisions of the Home Owners Refinancing Act place the Government, indirectly, in the position of mortgagee, and give it extensive powers over the entire mortgage business of the whole United States.

Most of the above measures would have been unthinkable even in 1930, but today they have the support of the majority of the citizens in all walks of life. As Mr. E. Francis Brown said in his article "The American Road to Fascism" in the July issue of Current History, "A great middle-class nation, disillusioned, embittered, has turned away from its tradition of individualism and laissez-faire capitalism."[43] It is not too much to expect that laissez-faire will be repudiated by the judiciary as it was repudiated by the legislative and executive divisions of the government.

In conclusion, it may be stated that the Supreme Court effects a nexus between our fundamental law and our fundamental economic institutions, and by its position as an agency of control it is a powerful factor in changing the contours of those institutions. The judicial process in the Supreme Court is no exception to the order of things everywhere. The trend of public opinion and the tremendous

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43 Current History, Vol. XXVIII, page 398, July, 1933. Raymond Moley, Assistant Secretary of State and close adviser of the President, has said that the administration is working for "an architecturally more harmonious national life," that it desires to "supervise the ebb and flow of economic affairs more closely" in order to "assure every American citizen . . . . that his general interest is not sacrificed to special interests."

influence Mr. Roosevelt commands can cause the judicial process of the Supreme Court to become merely a form of submission to the current drift. Some of the present members of the Supreme Court are usually so attuned psychologically that they cannot see the hidden danger until it is too late to avert it.

MUNICIPAL POWERS RELATING TO PROPERTY, PUBLIC PLACES AND WORKS

By Kenneth P. Vinsel*

In addition to the enactment and enforcement of ordinances and the exercise of police powers, municipalities are given authority to carry on useful local public works, utilities and services if they so desire. To carry out these purposes, the municipality must be able to acquire and hold both real and personal property, must have the power to sue and other such powers. Means must be provided whereby the municipal corporation may accomplish its tasks.

PROPERTY

Among the common law powers of municipal corporations are the powers to grant and receive, to purchase and to hold real and personal property for themselves and their successors. Blackstone called these powers "necessarily and inseparately incident to every corporation."[1] All municipalities in Mississippi are given these powers in express terms. In the absence of the statutes giving these express powers, it would probably be a power to be exercised by the municipalities, though subject to the will of the legislature. Such power as is expressly given is confined to the purposes and necessities of the municipality. The power is not confined to property within the corporate limits but extends outside.[2]

It has been held in Mississippi that a city may, without special authority from the legislature, take a devise of land beyond the city limits for a public park although it may not, in the absence of such special authority, be able to exercise any police power over it. The court said, "It is true the city may not have the same power of police over the park without its limits that it would have over one within them, but the laws of the state would be in full operation there and the right of the town, as owner, would be protected by them, as are the property rights of natural persons."[3]

Mississippi municipalities may purchase and hold prop-

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1 Blackstone's *Commentaries,* Vol. 1, p. 475.

2 *Code of 1930,* Sec. 2391, par. 2, 3.

3 Lester v. Jackson, 69 Miss. 887.

erty for purposes expressly stated. The express purposes are so broad, however, as not to be restrictive. Within the corporate limits the power must be "for *all proper municipal purposes,* and for parks, cemeteries, hospitals, schoolhouses, houses of correction, waterworks, electric lights and sewers." Outside of the corporate limits the corporation may acquire property for these and an additional purpose, "for pest houses."[4]

Authority on the part of a municipal corporation to acquire property includes any usual mode of acquisition not prohibited by law. The Mississippi law is broad in its grant of power on this subject, the municipality having the power "to make all contracts and to do all other acts in relation to the property and concerns of the municipality necessary to the exercise of its corporate or administrative powers."[5]

In the matter of the sale and disposal of municipal property the double nature of the municipal corporation and its functions, governmental and private, must be observed. Municipalities do not have the same power of disposal as have private proprietors. In Mississippi, the court has held that in the absence of legislative authority a municipal corporation is without power to sell or dispose of property held by it for governmental purposes. It has been held, however, that a city could sell a city hall, no longer used as such, where it had provided itself with a new city hall and that it was authorized to use the money obtained from the sale of the old one for the building of the new one. Property held for private purposes is subject to sale and conveyance at the discretion of the municipal authorities. Two conditions should probably be added to this freedom of discretion, (1) if the property is not needed for a municipal purpose and (2) the property must be disposed of for consideration.[6]

STREETS AND SIDEWALKS

Most important among the public places of a municipality is its streets. A "street" in Mississippi is held to be any public thoroughfare or highway, but the term is usually used to mean a public way or road in a municipality. The term "highway" as used in a state law, has been held not

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4 *Code of 1930,* Sec. 2391, par. 3.
5 *Code of 1930,* Sec. 2391, par. 4; Lester v. Jackson, 69 Miss. 887.
6 *Code of 1930,* Sec. 2391, par. 3; Marshall v. Meridian, 103 Miss. 206.

to include streets within the corporate limits of a municipality.[7]

Mississippi municipalities have the power to exercise the right of eminent domain in the laying out of streets as well as to secure land for other public purposes. The power is also given the municipalities "to open and lay out and construct streets and sidewalks, to exercise full jurisdiction over these as well as to repair, maintain, pave, sprinkle, adorn and light the same."[8] The power of a municipality over its streets is subject to legislative control. The legislature may even divest a municipality of control over its streets and authorize their use by a corporation, without compensation to the municipality.[9]

Land for the establishment of streets may be acquired by prescription and dedication as well as by the use of the right of eminent domain. Both of these methods of acquiring streets have been liberally interpreted for the municipalities. In a case where land was platted and mapped into lots and blocks with streets and the city afterwards extended its limits to include this platted territory and worked part of the streets, the court held that the city accepted the dedication of the streets, including those not graded and repaired.[10]

The mere drawing of a map showing certain parts to be streets, however, has been held not to be a dedication. In another case the owner impliedly dedicated a strip of land for a street by platting it and making a map and selling the lots as laid out on the plat. The municipality, for more than ten years, used only a portion of the land designated as a street but the court held that this did not deprive it of the right to use the entire strip for a street when necessary for the convenience of the public. Dedication of land for streets need not be shown by specific grant but where land is set apart as a highway or where lots are sold on a survey showing portions of the land to be used for highways it may be held as a dedication.[11]

Acceptance is usually held necessary to acquire land for streets. The court has held that the use of the land dedi-

7 Mobile Ry. Co. v. State, 51 Miss. 137; Theobold v. Louisville Ry. Co., 66 Miss. 279; Illinois Ry. Co. v. State, 94 Miss. 759.

8 *Code of 1930*, Secs. 2413, 2414.

9 Donnaher v. State, 8 S. & M. (Miss.) 649; Hodges v. Western Union, 72 Miss. 910; Canton v. Marshall, 84 Miss. 268.

10 Jackson v. Laird, 99 Miss. 476.

11 Berry v. McComb, 69 Miss. 882; Indianola Light Co. v. Montgomery, 85 Miss. 304; Meridian v. Poole, 88 Miss. 108; Vicksburg v. Marshall, 59 Miss. 563; New Orleans Ry. Co. v. Moye, 39 Miss. 374.

cated, the working of the streets or even the showing of the street on a city map was sufficient to constitute acceptance.[12]

The power to close and vacate any street or alley, upon due compensation being made to abutting land owners, is expressly given by statute to the governing authorities. Where it is made to appear to the authorities that the safety of the public demands it, it is within their power to close a street and a person damaged by the closing may recover damages against the city. The power to vacate streets does not empower a municipality to vacate on a condition to reopen unless compensation be made. The Mississippi court has held that a city has no power to sell or barter the streets which it holds in trust for the public for the benefit of a purely private interest. In the same case it was held that the courts of the state have jurisdiction to grant relief against improperly closing an alley, by ordinance, as such act is judicial and not a legislative act.[13]

The procedure to vacate must be in strict compliance with the statutory provisions relating to the subject and the exercise of the power to vacate is dependent upon the will and subject to the control of the state legislature. Where an abutting owner has convenient access to his property by other streets, he cannot complain of the closing of a street which gives him less convenient and reasonable access. Nor is a land owner entitled to compensation for the closing of a street which does not abut his property.[14]

A municipal corporation in the absence of express authorization, cannot grant a right to use its streets in a manner inconsistent with the rights of abutting property owners. An abutting owner, whether he owns the fee to the street or whether the fee is in the municipality, is entitled to compensation for any additional servitude placed on his property by any use of the street not incidental or necessary to its enjoyment by the public. The right to ingress and egress to and from his property also rests with the abutting owner, regardless of where the title to the street is vested.[15]

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12 Jackson v. Laird, 99 Miss. 476; Whitfield v. Meridian, 66 Miss. 570.

13 *Code of 1930*, Sec. 2412; Laurel v. Rowe, 84 Miss. 435; Poythree v. M. and O. Ry Co., 92 Miss. 638; Berry v. Mendenhall, 104 Miss. 94.

14 Polk v. Hattiesburg, 109 Miss. 872; Clinton v. Turner, 95 Miss. 594; Jackson v. Welch, 136 Miss. 223; Wesson v. Swinney, 144 Miss. 876.

15 Brahan v. Meridian Home Tel. Co., 97 Miss. 326; Laurel v. Rowe, 84 Miss. 435; Hazelhurst v. Mayes, 84 Miss. 7; Theobold v. Louisville, 66 Miss. 279.

Within federal and state constitutional limitations, the legislature, as representative of the state, has the power to control and regulate streets in any way not inconsistent with their proper use. The legislature may delegate to municipalities the control and regulation of its streets. It may authorize the municipality to compel roadwork by its inhabitants or the payment of money in lieu of such work. Both of these powers have been authorized by the Mississippi legislature.[16]

A municipality may lawfully use the streets for the construction of sewers, drainage, gas and water pipes, poles and wires for electric lights. In the absence of constitutional, charter or statutory provisions so permitting, a municipality has no power to authorize the use of its streets for a private purpose, that is, one from which neither the municipality nor its citizens derive any consideration or benefit.[17]

The primary purpose for which streets are established is for the use of the public as a highway for travel and transportation. Everyone is entitled to the right to use the streets in pursuit of lawful business, convenience or pleasure upon terms of equality with others. In an opinion which defined the purpose of the establishment of streets, the court held that no private individual or corporation has a right to use the streets in the prosecution of the business of a carrier for private gain without the consent of the state or municipality, nor except upon the terms and conditions prescribed by the state or municipality. The use of the streets as a place of business and private gain is a mere privilege over which the powers of the legislature or the city to regulate are very broad. Ordinary care over its streets is the measure of diligence imposed upon municipal corporations.[18]

Sidewalks are generally included in the word "street". Like jurisdiction and control by the municipal authorities extends over sidewalks as over streets. A sidewalk is merely that part of the street reserved exclusively for pedestrians. Municipal authorities have the power to conconstruct and maintain sidewalks and to levy and collect

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16 Ridgeland v. Madison Co., 154 Miss. 613; Wheat v. Poplarville, 149 Miss. 424; Meridian v. Telegraph Co., 72 Miss. 910; Morris v. Greenwood, 73 Miss. 430; *Code of 1930*, Secs. 2407, 2414

17 Gulfport v. Manuel, 123 Miss. 266; Caldwell v. George, 96 Miss. 484; Hodges v. Western Union, 72 Miss. 910.

18 Scott v. Hart, 128 Miss. 353; Nesbit v. Greenville, 69 Miss. 22; Walker v. Vicksburg, 71 Miss. 899; Jackson v. Clark, 152 Miss. 731.

taxes by special assessment to cover the cost of construction or maintenance.[19]

Both streets and sidewalks are for the use of the public over their entire length and breadth and the city may not permit a permanent obstruction in the absence of legislative authority. Any unreasonable and unauthorized obstruction of a street is a nuisance. The word "street" includes sidewalks and alleys. An individual may maintain an action to enjoin or abate an obstruction where he has sustained or will sustain special injury. The municipality, under its general powers as a public trustee and as a governmental agent, may, in proper cases, abate an obstruction by itself removing it. An abutter may ordinarily enjoin the obstruction of a street in front or near his property where he suffers special injury different from that suffered by the public in general, as where his easement of access or the value of his property is impaired.[20]

The power of a municipality over the trees between sidewalk and roadway, or within the street, includes the right to remove or trim them where it is reasonably necessary for the improvement of the street. Abutting owners who have a property right in trees in a street, as where they own the fee of the street, or have planted and maintained the trees, although they do not own the fee of the street, have a right of action for a wrongful injury or destruction of the trees.[21]

SEWERS

A drainage or sewerage system constructed by a municipality is the property of the municipality. To regulate and control drains and sewers is incidental to their ownership. Mississippi municipalities are, however, expressly given control and jurisdiction over drains and sewers as well as the power to construct them. In the construction of sewerage and drainage systems, municipalities may exercise the right of eminent domain, securing land outside the corporate limits as well as within. Municipalities may acquire a prescriptive right to a street or other property. Where a city digs a ditch and maintains it for more than

19 *Code of 1930,* Secs. 2411, 2414; Wilzinski v. Greenville, 85 Miss. 393.

20 Illinois Central v. Thomas, 75 Miss. 54; Durant v. Castleberry, 106 Miss. 699; Caldwell v. George, 96 Miss. 484; Shoemaker v. Coleman, 94 Miss. 619; Canton Warehouse Co. v. Potts, 69 Miss. 31; Biloxi Ry. Co. v. Maloney, 19 So. 832.

21 Durant v. Castleberry, 106 Miss. 699; Brahan v. Meridian Tel. Co., 97 Miss. 326; Cumberland Tel. Co. v. Cassiday, 78 Miss. 666.

ten years, it obtains the right by prescription to maintain it. It does not acquire the right however, to enlarge the ditch or to increase the flow of water. Mississippi municipalities seem to have adequate powers over the subject of sewers and drainage.[22]

PUBLIC BUILDINGS

Municipal corporations in Mississippi may by charter provisions regulate and control the use of their public buildings. All municipalities, including cities, towns and villages have power to establish, maintain, and regulate markets, market houses, municipal prisons, city halls, school houses, engine houses and all other necessary municipal buildings. Cities and towns, but not villages, may erect, maintain and regulate hospitals, workhouses and houses of correction in the corporate limits or within three miles of the corporate limits. Cities and towns may also maintain and regulate libraries for the public use.[23]

Under a law passed in 1930, cities and towns are authorized to insure municipal property, including buildings, furniture, books, records and all other property against loss by fire or tornado. They are also authorized to carry employee's liability, steam boiler, plate glass and other miscellaneous casualty insurance, as the authorities may deem proper. This had been done by some municipalities previous to the passage of the law. Although never tested in the courts as to the constitutionality of such insurance it was thought best to pass the authorizing act to remove all doubt as to the ability of towns and cities to insure their property.[24]

PUBLIC PLACES

All municipalities are empowered to regulate parks, public grounds, depots, depot grounds, and places of storage of freight and goods within the corporate limits. The municipality may also provide for and regulate the construction and passage of railways and street railways through its streets and public grounds. A street railway company, having permission to lay tracks in the streets, has been held to have authority to cross the tracks of a railway in the street without instituting condemnation proceeding or paying damages.[25]

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22 *Code of 1930*, Secs. 2391, 2396, 2413, 2414; Sturges v. Meridian, 95 Miss. 35.

23 *Code of 1930*, Secs. 2403, 2406, 2419, 2421, 2435, 2438.

24 *Code of 1930*, Sec. 2443.

25 *Code of 1930*, Secs. 2399, 2447; Miss. Central Ry Co. v. Hattiesburg Traction Co., 109 Miss. 101.

Cities and towns have the power to regulate the entrances to all public halls, churches and buildings, including the way of ingress and egress.[26]

Although municipalities may regulate and control public parks, they are limited as to the use of the park where such was donated for a specific purpose. Where a park is donated for a specific purpose, such as an ornamental park exclusively, the municipal authorities may be enjoined from subverting the object of the donation. Upon abandonment by a municipality of the purpose for which the land was donated, the land reverts to the original donors.[27]

PUBLIC UTILITIES

Means of transportation and communication can be controlled by municipal authorities only upon expressed authorization by the legislature. The Mississippi legislature authorizes the municipalities to regulate these agencies to the extent that the state constitution, state laws and policies do not forbid. The statutes grant rather broad powers and a large amount of control may be exercised over railways, street railways, telephone and telegraph lines, wharves and harbors, landings, highways and other means of transportation and communication. The state has generally delegated to municipalities the supervision of these agencies within the corporate limits, subject to constitutional and statutory limitations, both federal and state, and to the policy of the state.[28]

Municipalities may grant any person or corporation the use of its streets or public grounds for the purpose of laying out gas, water, sewer, or steam pipes, conduits for electric light, telegraph and telephone lines, to be used in supplying the municipality. No such franchise may extend for a longer period than twenty-five years and then the privilege must not be exclusive.[29]

Mississippi municipalities have a broad grant of power in regard to the erection, purchase, maintenance and regulation of municipal waterworks plants and for the contracting with another person for the maintenance of such a plant. A contract for the maintenance of a waterworks plant must not extend for over twenty-five years and the consent of a majority of the qualified electors is necessary

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26 *Code of 1930,* Sec. 2439.

27 Rowzee v. Pierce, 75 Miss. 846.

28 *Code of 1930,* Secs. 2399-2401, 2404, 2420, 2432, 2442, 2447, 2449, 2464-2473.

29 *Code of 1930,* Secs. 2401, 2644.

before such a contract may be entered into. Provision is made by statute for inspection and regulation of water-works companies not owned by the municipality. Cities and towns having over three hundred inhabitants may supply both water and electricity to consumers outside the corporate limits, within a distance of three miles. A rate may be charged outside consumers to the extent of double the rate charged within the corporate limits.[30]

Broad discretion is granted to municipal corporations in Mississippi in regard to the erection, maintenance, purchase, sale or lease of public utilities. The state legislature has granted general powers to the municipality over this subject, specifying only the methods of procedure. The statute authorizing the sale or lease of public utility plants, passed in 1924, does not apply to cities of more than twenty thousand inhabitants. The section begins by stating that "All municipalities of the state are hereby empowered," but later in the section the provisions are designated as not applying to cities of over twenty thousand inhabitants. In cities under twenty thousand, the governing board must first publish their intention to sell or lease. A protest of twenty percent of the qualified voters causes a special election to determine for or against the lease or sale. If no protest is made within ten days after final publication, no election is necessary. Provision is also made for use of the proceeds of such a sale.[31]

Adequate authorization is given the municipalities in regard to issuing bonds or promissory notes for the erection or maintenance of public utilities which are municipally owned. For the regulation and inspection of those public utilities privately owned, the legislature has given the municipality some powers. Rates may be prescribed by ordinance, subject to reviewal by the chancery court. Inspection must be submitted to by the public utility company.[32]

Wide powers are given the municipalities of Mississippi in regard to control of their property and in regard to the regulation and ownership of public utilities.

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30 *Code of 1930,* Secs. 2415, 2429, 2452; Light Co. v. Jackson, 73 Miss. 598; Adams v. Bullock, 94 Miss. 27; Vicksburg Water Co. v. Yazoo & Ry. Co., 96 Miss. 807; Griffith v. Vicksburg, 102 Miss. 1.

31 *Code of 1930,* Secs. 2455, 2550.

32 *Code of 1930,* Secs. 2426, 2458, 2459, 2461-2469, 2484-2487; Griffith v. Vicksburg Water Co., 88 Miss. 371.

MISSISSIPPI LAW JOURNAL

PUBLISHED QUARTERLY, BY THE

University of Mississippi Law School and Mississippi State Bar

SUBSCRIPTION PRICE, $3.00 PER YEAR 75 CENTS PER NUMBER

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MISSISSIPPI LAW JOURNAL

VOLUME V

1932-1933

PUBLISHED BY
UNIVERSITY OF MISSISSIPPI LAW SCHOOL
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MISSISSIPPI STATE BAR

UNIVERSITY, MISSISSIPPI
1933

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